TEXAS JOURNAL

ON CIVIL LIBERTIES & CIVIL RIGHTS

VOL. 20 NOS. 1-2 2014–2015 PAGES 1 TO 236

VOLUME 1

ARTICLES

NOTES

VOLUME 2

ARTICLES

NOTES

A Journal Publication of The University of Texas School of Law and the Individual Rights and Responsibilities Section of the State Bar of Texas

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS SPONSORSHIP

The TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS offers varying sponsorship levels:

Platinum Sponsor:	**$3000 +**
Gold Sponsor:	**$1000 +**
Silver Sponsor:	**$500 +**
Bronze Sponsor:	**any donation up to $500**

In appreciation of your donation, you will receive the following recognition:

- Name printed in Volume 21.1 of the TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS with sponsorship level (Platinum, Gold, Silver, or Bronze) identified and listed on our website.
- A copy of the fall and spring editions of Volume 21 of the TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS for Silver Level sponsors and above.

MAKE CHECKS PAYABLE TO
Texas Journal on Civil Liberties & Civil Rights
MAIL DONATIONS TO
Texas Journal on Civil Liberties & Civil Rights
727 East Dean Keeton St., Austin, TX 78705
OR DONATE ONLINE AT
http://sites.utexas.edu/tjclcr/

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS
LETTER FROM THE EDITOR

Dear Reader,

Thank you for your patronage. The TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS was founded in 1992 at the University of Texas School of Law. The Journal has since evolved into one of the premiere civil rights journals in the country.

The Journal is published twice a year with support from the Individual Rights and Responsibilities Section of the State Bar of Texas and private donors. The Journal is run by law students and is overseen by a Board of Advisors.

In addition to publishing biannually, the Journal hosts an annual symposium featuring civil rights scholars from around the nation. The Journal also hosts speeches, brown bag events, and other events to expose students to this important area of law.

We at the Journal are pleased to publish in this Volume both issues from the 2014–2015 year. We hoped that, together, the two issues might present a more cohesive picture of some of the civil rights problems that have become so increasingly prominent in our society over the past year.

We appreciate your continued support.

Sincerely,

Amanda Moon Leatherman
Editor-in-Chief

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS

Subscription Information: The TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS (ISSN 1930-2045) is published twice a year.

The annual subscription price is $40.00 domestic / $50.00 foreign. Austin residents add 8.25% sales tax, and other Texas residents add 7.25% sales tax. Send subscriptions to: School of Law Publications, The University of Texas at Austin, P.O. Box 8670, Austin, Texas 78713-8670.

A subscription is provided to members of the Individual Rights and Responsibilities Section of the State Bar of Texas as part of the benefits they receive from their annual Section dues. To become a member of the IRR Section, call (800) 204-2222 or write to the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

POSTMASTER: Send address changes to School of Law Publications, Inc., The University of Texas at Austin, P.O. Box 8670, Austin, Texas 78713-8670.

Manuscript Submissions: The Editorial Board and The University of Texas are not in any way responsible for the views expressed by the contributors. We welcome the unsolicited submission of articles from scholars, practitioners, businesspeople, government officials, judges, and students on topics relating to recent developments in civil liberties and civil rights law.

All submissions are reviewed throughout the year on a rolling basis. The Selection Committee seeks to provide authors with timely responses; however, the Committee will sometimes hold articles for consideration in a future publication unless the Journal is notified of a withdrawal. Please send submissions, accompanied by a curriculum vitae and a cover letter, to the Journal via ExpressO or by e-mail to TJCLCRsubmissions@gmail.com.

Manuscripts must conform with the most recent version of The Bluebook: A Uniform System of Citation, published by the Harvard Law Review Association. As is the standard practice of publications in the United States, the Journal will hold copyrights to the publication.

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 20 Fall 2014 Number 1

Cite as TEX. J. C.L. & C.R.

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 20 Spring 2015 Number 2

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 20, Number 1, Fall 2014

ARTICLES

NOTES

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 20, Number 2, Spring 2015

ARTICLE

NOTES

Articles

Reforming High School American History Curricula: What Publicized Student Intolerance Can Teach Policymakers

Douglas E. Abrams*

---

* Associate Professor of Law, University of Missouri. B.A. 1973, Wesleyan University; J.D. 1976, Columbia University School of Law.

I. INTRODUCTION

The descent from local celebration to national embarrassment happened overnight to the Phillipsburg (N.J.) High School varsity wrestling team. A day after the Stateliners capped an undefeated season by capturing a state championship on February 16, 2014,[1] a photograph surfaced on social media showing seven white team members posing with a dark-colored wrestling dummy that was hanged from the ceiling with a noose around its neck.[2] The life-size, black wrestling dummy wore the T-shirt of perennial rival Paulsboro (N.J.) High School, another wrestling powerhouse located in a city where about one-third of the residents are black (Phillipsburg, by contrast, is about 85% white).[3] One Phillipsburg student wrestler saluted the camera while standing behind the dummy, another pointed at the hanging dummy while holding a paddle, and two more students wore hoodies that came to a point at the top, reminiscent of the Ku Klux Klan.[4]

Students at McAdory High School (McCalla, Ala.) created a similar stir on a Friday night just three months earlier. Before a second-round football playoff game against the Pinson Valley (Ala.) High School Indians on November 15, 2013, McAdory cheerleaders and students held a bust-through banner reading, "Hey Indians, get ready to leave in a TRAIL OF TEARS Round 2."[5]

The same night as the McAdory incident, Dyersburg (Tenn.) High School students, on the sidelines and in the stands, unfurled their own large "Trail of Tears" banner at a football playoff game against the North Side (Jackson, Tenn.) High School Indians.[6] Photographs of both

---

[1] Don Benevento, *State To Probe Wrestler Photo*, COURIER-POST (Cherry Hill, N.J.), Feb. 20, 2014, at A1; *High School Wrestling Team Sparks Outrage Over Racist Photo of Them Lynching 'Black' Dummy*, MAILONLINE (Feb.18, 2014, 6:25 PM), http://www.dailymail.co.uk/news/article-2562508/High-school-wrestling-team-fire-taking-racist-photo-just-one-day-winning-New-Jersey-state-championships.html, <http://perma.cc/HG4Z-EDEE>.

[2] Philip Caulfield, *New Jersey Wrestlers Scratched from Upcoming State Tournament in Wake of Controversial Noose Photo*, N.Y. DAILY NEWS (Feb. 20, 2014, 3:00 PM), http://www.nydailynews.com/news/national/new-jersey-wrestlers-scratched-upcoming-tournament-wake-controversial-noose-photo-article-1.1621411, <http://perma.cc/BVS7-4DK2>.

[3] Benevento, *supra* note 1.

[4] *See* Christopher Silvestri, *No Charges for Wrestlers in 'Lynching' Photo*, COURIER-POST (Cherry Hill, N.J.), Apr. 18, 2014, at A6 (explaining that the county prosecutor's office and local police found no criminal wrongdoing by the students).

[5] *See* McAdory High School apologizes for Trail of Tears sign, FOX 6 WBRC (Nov. 25, 2013, 1:59 PM), http://www.myfoxal.com/story/24001310/mcadory-high-school-apologizes-for-trail-of-tears-sign, <http://perma.cc/Y9NE-LV6H> (showing McAdory photograph); *see also* Robert Carter, *Time for a History Lesson: McAdory, JefCoEd Apologize for 'Trail of Tears' Banner at Pinson Valley Game*, N. JEFFERSON NEWS (Gardendale, Ala.), Nov. 18, 2013 (noting that Pinson Valley also uses a student dressed as a Native American to serve as its mascot).

[6] Brandon Shields, *'Trail of Tears' Sign Draws Ire*, JACKSON SUN (Tenn.), Nov., 22, 2013, at B1; *see also* Cameron Smith, *Another School Used a 'Trail of Tears' Banner Against a Foe Called the*

football banners quickly reached social media for wide dissemination.[7]

Chatter on social media speculated about whether racism motivated the students at the three high schools or whether the students failed to appreciate the historical significance of the wounds that their publicized taunting opened.[8] In a written apology read by their lawyer at a press conference, the seven Phillipsburg wrestlers insisted that their actions "were not premeditated, but rather were spontaneous gestures without any forethought";[9] the seven insisted that they "did not intend to disparage anyone."[10] Not convinced, one skeptical columnist assailed their posed photograph as "obviously a well-planned, thought-out attack."[11]

Whatever impulses drove the students at the three high schools, the back-and-forth on social media overlooked a more constructive point about public education that warrants attention from state and local policymakers. The three incidents lend persuasive support to prominent figures who see shortcomings in the way the nation's history—particularly incidents that cause general discomfort today—is taught in many public high schools under state standards and curricula.

Ignorance of American history is one plausible explanation for the Phillipsburg, McAdory, and Dyersburg incidents, and I would hope that it is the actual explanation for those incidents. I hope that the students would not have belittled lynching or the Trail of Tears if their high school history classes had taught them that the first was a form of domestic terrorism fueled by mob rule for decades and that the second

---

Indians, YAHOO! PREP RALLY BLOG (Nov. 22, 2013, 9:03 AM), http://sports.yahoo.com/blogs/prep-rally/another-school-used-trail-tears-banner-against-foe-140317410.html, <http://perma.cc/47XC-3DSK> (showing Dyersburg photograph). Such incidents are not confined to the high school level. Before a nationally-televised game between the Oklahoma State University Cowboys and the Florida State Seminoles, OSU students displayed a banner reading, "Send 'em home #trail of tears #go pokes." John Helsley et al., *OSU Football Notebook: 'Trail of Tears' Sign Causes Stir, Apology*, DAILY OKLAHOMAN, Aug. 31, 2014, at B3. The OSU administration apologized for "the insensitive sign . . . and . . . requested that it be removed"; the Cherokee Nation's Principal Chief responded that "[s]ince these students clearly don't understand the gravity of these events, this should be viewed as a teaching moment for these young people. *Id.*; *see also Student Apologizes for Offensive Banner*, STILLWATER NEWS PRESS (Okla.), Sept. 3, 2014 (setting forth the apology by student who displayed the banner with his friends).

[7] Shields, *supra* note 6 (noting that one photograph was on a page officially linked to the Dyersburg football program).

[8] Emily Cummins, *Controversy Over Phillipsburg Wrestlers Debated in Social Media*, THE WARREN REP., http://www.nj.com/warrenreporter/index.ssf/2014/02/poll_phillipsburg_photo_debate.html, <http://perma.cc/3XEX-WBT6> (Feb. 20, 2014); Greg Tufaro, *Controversial Photo Shocks Scholastic Wrestling Community*, ASBURY PARK PRESS (N.J.), Feb. 18, 2014.

[9] *Phillipsburg High School Wrestlers Release Statement* (Feb. 21, 2014), http://www.scribd.com/doc/208271315/Phillipsburg-High-School-wrestlers-release-statement, <http://perma.cc/47JJ-XP46>.

[10] *Id.*

[11] Kevin Minnick, *Wrestling Photo Has Shameful Overtones*, COURIER-POST (Cherry Hill, N.J.), Feb. 22, 2014, at A1.

was a government-sanctioned death march forced on several thousand helpless Native Americans after wholesale land theft.[12]

"We're raising young people who are, by and large, historically illiterate,"[13] says David McCullough, the dean of American historians after winning two Pulitzer Prizes and the Presidential Medal of Freedom, the nation's highest civilian award.[14] The author of such masterpieces as *Truman*, *John Adams*, and *1776*,[15] McCullough places the blame squarely where it belongs, on "all of us who are educators, parents, and writers."[16] "We must not blame our children, or our grandchildren, for not knowing what they haven't been taught."[17]

Research and surveys (explored in Part II) support McCullough's critique of teaching in American history. Regardless of state curriculum standards or the content of history textbooks available nationally, high schools frequently fail to engage students in frank discussion of discomforting subjects such as lynching and the Trail of Tears. Lessons undelivered about sensitive aspects of our national heritage affect both athletes and non-athletes, who sit in the same classrooms throughout the academic year. Deficient history curricula can pass more easily under the radar, however, when the effects appear only on individual students' final examinations, reported aggregate standardized test scores, or the pages of government reports and private surveys unseen by most Americans.

Because of its prominence in communities large and small, however, high school sports commands coverage in the local print and broadcast media, and local rivalries can help unite communities behind a common cause.[18] When interscholastic athletes and their student fans demonstrate inattention to history—as they may have done at the Phillipsburg, McAdory, and Dyersburg high schools—people notice much more easily than when such inattention is demonstrated solely in the classroom.

---

[12] *See infra* notes 63–81 and accompanying text.

[13] Brian Bolduc, *Don't Know Much About History*, WALL ST. J., June 18, 2011 (quoting McCullough); *see also* David McCullough, *History and Knowing Who We Are*, 58 AM. HERITAGE, Winter 2008 ("Today, the new generation of young Americans are like a field of cut flowers, by-and-large historically illiterate. This does not bode well for our future.")

[14] *David McCullough: America's Greatest Historian*, SIMON & SCHUSTER, http://pages.simonandschuster.com/davidmccullough/abouttheauthor, <http://perma.cc/AHM8-RR2M>.

[15] *Id.*

[16] McCullough, *supra* note 13.

[17] William Jewell College, Achievement Day, Achieve Summer 2007, http://www.jewell.edu/gen/media/achieve/summer2007/achievementPulitizerPrizeWinningAuthor.html, <http://perma.cc/8LKC-ZRZW>.

[18] *See, e.g.*, Julie Garcia, *Calhoun Coach Shocked By Realignment to Houston-Area District*, VICTORIA ADVOC. (Tex.), Feb. 3, 2014 (quoting an area attorney, decrying the loss of "historic rivalries," that the "thing that brings us together is high school football. We're a really tight-knit community.").

Public notice can generate special opportunities to invigorate local high school American history classes with renewed depth and candor. Officials at all three high schools recognized that in daily interactions with children, wise parents and teachers embrace "teachable moments," the label frequently given to opportunities to draw positive lessons from negative events.[19] In much the same way, educators themselves can learn positive lessons from publicized negative incidents in which students resort to racial and ethnic taunts.[20]

Educators' quickest official reflex to public embarrassment may be to dismiss these incidents as random occurrences that warrant discipline of individual students. Also available, however, is a more constructive response (advocated in Part III) that officials at the Phillipsburg, McAdory, and Dyersburg high schools each belatedly embraced. Officials can recognize that high schools shortchange students—not only when they give American History instruction short shrift generally, but also when instruction ignores or glosses over incidents such as lynching or the Trail of Tears, which might appear unsettling to today's national sensibilities.

This is not to say that high school history classes can shoulder the entire burden of educating students about unsettling aspects of our national past. Students' reactions to race or ethnicity stem, partly at least, from family upbringing or from social influences that remain largely or entirely impervious to classroom historical inquiry.

Before the Phillipsburg wrestlers generated headlines, however, classroom give-and-take (discussed in Part IV) might have stimulated the students to inspect gruesome photographs of lynchings that are readily available on the Internet with a simple Google search and a mouse click.[21] At all three high schools, classroom discussion might have

---

[19] *See, e.g.*, Phil Anastasia, *Paulsboro Takes High Road in Photo Controversy*, PHILA. INQUIRER, Feb. 21, 2014, at C13 (quoting Paulsboro principal and wrestling coach Paul Morina: "[T]his is a teachable moment not just for Paulsboro kids but for all kids. Everybody can learn from this."); Benevento, *supra* note 1 (quoting Paulsboro school superintendent: "We're taking this to be a teachable moment in Paulsboro"); *High School Forced to Apologize For Insulting Indian Football Opponents With 'Trail of Tears' Sign Made By Cheerleaders*, MAILONLINE, Nov. 19, 2013, http://www.dailymail.co.uk/news/article-2510070/High-school-apologizes-insulting-Indian-opponents-sign.html, <http://perma.cc/3WNE-3QM5> (quoting Jefferson County (Ala.) school superintendent: "We can use this unfortunate [McAdory] event as an important teachable moment").

[20] *See, e.g.*, *Fury Erupts Over Racially-Charged Tweets After Westchester High School Basketball Game*, CBS NEW YORK (Mar. 5, 2014, 11:02 PM), http://newyork.cbslocal.com/2014/03/05/fury-erupts-over-racially-charged-tweets-after-westchester-high-school-basketball-game, <http://perma.cc/4LCD-57KN> (discussing racial tweets on Twitter by Mahopac (N.Y.) High School students after the boys basketball team lost a semifinal playoff game to Mount Vernon, whose roster included black players); *We're Too Good To Put Up With Racist Vitriol*, ROCHESTER DEMOCRAT & CHRON. (N.Y), Feb. 11, 2013 (discussing fans who chanted anti-immigrant slurs against Florida high school basketball team, which included Hispanic players who were born in the U.S.).

[21] *See, e.g.*, WITHOUT SANCTUARY, http://withoutsanctuary.org/main.html, <http://perma.cc/M2PZ-ZUAM> (showing photographs of lynchings).

equipped students with an inner sense about when taunting crosses a reasonable line between adolescent banter and racial or ethnic slurs because, as historian James W. Loewen advises, "[t]he past supplies models for our behavior."[22]

II. LESSONS FROM THE PAST

A. Systemic Deficiencies in American History Education

Liberal and conservative organizations that have researched the issue are united in their assessments that state-mandated American history instruction in public school classrooms generally remains "dismal."[23] The Southern Poverty Law Center, for example, says that by virtually "ignor[ing] our civil rights history,"[24] schools are "failing in [the nation's] responsibility to educate its citizens to be agents of change."[25] The Thomas B. Fordham Institute finds that "U.S. history standards across the land are alarmingly weak. . . . No wonder so many Americans know so little about our nation's past. Yet this subject is essential to an educated citizenry."[26]

Surveys chronicle this evident systemic failure and weakness. In 2010, the U.S. Department of Education's National Assessment of Educational Progress reaffirmed that students perform worse in civics and American history than in any other academic subjects.[27] According to the *Wall Street Journal*, only 12% of high school seniors had a solid understanding of American history and only 2% understood the importance of *Brown v. Board of Education*,[28] the U.S. Supreme Court's landmark 1954 school desegregation decision that fundamentally

---

[22] JAMES W. LOEWEN, TEACHING WHAT *REALLY* HAPPENED: HOW TO AVOID THE TYRANNY OF TEXTBOOKS & GET STUDENTS EXCITED ABOUT DOING HISTORY 12 (2010).

[23] *Fordham Institute: State History Standards 'Dismal'*, TRAIL OF THE TRAIL (May 9, 2014), http://traileofthetrail.blogspot.com/2011/02/fordham-institute-state-history.html#!/2011/02/fordham-institute-state-history.html, <http://perma.cc/JK6B-L8X2>.

[24] SOUTHERN POVERTY LAW CENTER, TEACHING THE MOVEMENT: THE STATE OF CIVIL RIGHTS EDUCATION IN THE UNITED STATES 2011 6 (2011).

[25] *Id.* at 7; *see also, e.g.*, *Q&A with Ralph Nader*, C-SPAN (Apr. 25, 2014), http://www.c-span.org/video/?318980-1/qa-ralph-nader, <http://perma.cc/N46K-2FLU> (stating that young people today know "even less history than 20, 30, 40 years ago").

[26] *Fordham Institute: State History Standards 'Dismal'*, *supra* note 23 (quoting President of the Fordham Inst., Chester E. Finn, Jr.).

[27] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: U.S. HISTORY 2010 (2011), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2010/2011468.pdf, <http://perma.cc/FC9F-CKQM>.

[28] Bolduc, *supra* note 13.

changed American life.[29]

Concerns about the quality and content of American history instruction in public schools are nothing new. Historian Kenneth C. Davis, for example, discusses a 1987 survey which found that a third of high school juniors "couldn't identify the Declaration of Independence as the document that marked the formal separation of the thirteen colonies from Great Britain. Only 32 percent . . . could place the American Civil War in the correct half century."[30] Lack of student knowledge, of course, does not necessarily mean that schools overlooked these facts or the analysis they generate, but such low percentages seem difficult to square with any semblance of robust American history curricula.

Davis reserved his harshest criticism for the way secondary schools treat uncomfortable aspects of our national history, such as lynching and the Trail of Tears. "There has always been a tendency to hide the less savory moments from our past," he argues.[31] Additionally he says:

> Many of us also learned about the past from textbooks that served up the past as if it were a Hollywood costume drama. In schoolbooks of an earlier era, . . . [s]lavery also got the glossy make-over—it was merely the misguided practice of the rebellious folks down South until the "progressives" of the North showed them the light. American Indians were portrayed in textbooks in the same way they were in Hollywood Westerns.[32]

B. Today's American History Textbooks

Textbook selection, the foundation of classroom study, begins at the state level. In American history and other subjects, most states allow local school districts to choose their own textbooks, provided that the books chosen include coverage that meets state standards.[33] In twenty states (so-called "adoption states"), however, the state board of education selects textbooks to be used throughout the state.[34] Texas and California, the nation's two largest textbook purchasers, are both among the twenty adoption states.[35]

---

[29] *See generally Brown*, 347 U.S. 483 (1954).

[30] KENNETH C. DAVIS, DON'T KNOW MUCH ABOUT HISTORY xviii (anniversary ed. 2011).

[31] *Id.* at xix.

[32] *Id.*

[33] Richard Fausset, *Alarm Over Textbooks From Texas*, L.A. TIMES, Mar. 23, 2010, at A6.

[34] *Id.*

[35] *Id.*; *see also, e.g.*, Valerie Strauss, *The Answer Sheet*, WASH. POST, Apr. 5, 2010, at B2 (quoting

The Texas State Board of Education revamped statewide public school American history curricular standards in 2010. In its state-by-state rankings, the Fordham Institute gave Texas a grade of "D" for mandating "a politicized distortion of history . . . offering misrepresentations at every turn."[36] In particular, the state "distorts or suppresses less triumphal or more nuanced aspects of our past that the Board found politically unacceptable"[37]:

> Native peoples are missing until brief references to nineteenth-century events. Slavery, too, is largely missing. Sectionalism and states' rights are listed *before* slavery as causes of the Civil War, while the issue of slavery in the territories—the actual trigger for the sectional crisis—is never mentioned at all. During and after Reconstruction, there is no mention of the Black Codes, the Ku Klux Klan, or sharecropping; the term "Jim Crow" never appears. Incredibly, racial segregation is only mentioned in a passing reference to the 1948 integration of the armed forces.[38]

Because Texas is one of the nation's largest purchasers of school textbooks, selections made by its state board of education have traditionally had a disproportionate effect on the content of textbooks used throughout the nation.[39] Observers disagree about whether the Lone Star State's effect on content and coverage has diminished somewhat in recent years because technology may permit national publishers to tailor books to meet the expectations of individual states.[40] Pulitzer Prize-winning Civil War historian James McPherson concludes, however, that Texas "puts pressure on national textbook publishers because it is such a large market."[41]

David McCullough finds that, like the high school American

Pulitzer Prize-winning Civil War historian James McPherson: Texas state board of education "prescribes the acceptable texts for every public school in the state.").

[36] SHELDON M. STERN & JEREMY A. STERN, THOMAS B. FORDHAM INST., THE STATE OF STATE U.S. HISTORY STANDARDS 2011 141 (2011).

[37] *Id.* at 142.

[38] *Id.*; *see also Texas Takes Last Pass at Social Studies Textbooks*, TEXAS TRIBUNE, OCT. 24, 2014, http://www.texastribune.org/2014/10/24/texas-takes-last-pass-social-studies-textbooks/, <http://perma.cc/Y9B3-CEJ4> (quoting chairwoman of history department at the University of Texas at Austin that the "omissions of fact" in a state textbook up for approval indicates policymakers "don't want students to dwell on unpleasant aspects of the past" but that students "know we live in a hyperpartisan society today, that there are real debates about all kinds of things").

[39] Fausset, *supra* note 33.

[40] *See, e.g.*, Russell Shorto, *Founding Father?*, N.Y. TIMES, Feb. 14, 2010, at 32 ("[W]hile technology is changing things, textbooks—printed or online— are still the backbone of education."); *see also, e.g.*, Fausset, *supra* note 33 (quoting a book publishing industry trade association executive that "publishers have grown accustomed to regularly printing different textbooks to conform to different states' needs").

[41] Valerie Strauss, *The Answer Sheet*, WASH. POST, Apr. 5, 2010, at B2 (quoting McPherson).

history textbooks that Davis described from his upbringing, many 21st century textbooks still serve up "politically correct mush,"[42] often born of sensitivity and fear of controversy about national embarrassments such as lynching and the Trail of Tears. Loewen says that "[n]ot one high school textbook on American history includes a lynching photo."[43] Such a photo might have made searing impressions on the Phillipsburg wrestlers and spared them public embarrassment and public apology for a posed photograph that they later insisted was "spontaneous . . . without any forethought."[44]

The tenor and content of American history textbooks have changed since the early 1990s,[45] though the extent and wisdom of the changes remain matters for debate. The American Textbook Council asserts that in the name of multiculturalism, American history textbooks approved for use in the nation's high school classrooms began emphasizing "many historical injustices heaped on minorities, women, and immigrants," including "lessons mourning for the past's many victims"[46]:

> The old master narratives in yesteryear's textbooks -- faith in progress and patriotic pride -- have vanished, too rosy and innocent in view. What has replaced them is too often a nation that has repeatedly fallen short of its ideals, led by a patriarchy that deserves censure for its past treatment of female, non-white, and Native Americans, for trade in black human labor, and for its exploitation of the wilderness landscape and of immigrants. Young readers will encounter minority heroism and suffering. They may learn about a nation's shameful past, learning about events in such a way as to undercut civic confidence and trust. They may hear lurid tales of Western rapacity, genocide and cruelty. . . . They may conclude . . . that the nation's record is indelibly tainted from the start.[47]

---

[42] William Jewell College, *supra* note 17; *see also* Brian Bolduc, *supra* note 13 (quoting McCullough: "so politically correct as to be comic").

[43] LOEWEN, *supra* note 22, at 16.

[44] *Phillipsburg High School Wrestlers Release Statement*, *supra* note 9.

[45] GILBERT T. SEWALL, HISTORY TEXTBOOKS AT THE NEW CENTURY 6 (2000); *see also, e.g.*, RAY ALLEN BILLINGTON ET AL., THE HISTORIAN'S CONTRIBUTION TO ANGLO-AMERICAN MISUNDERSTANDING: REPORT OF A COMMITTEE ON NATIONAL BIAS IN ANGLO-AMERICAN HISTORY TEXTBOOKS 1–93 (1966) (voicing concern that in junior high school history textbooks, "authors seem impelled to repeat discredited myths and enshrine outworn folktales. These writers, in some cases outstanding historians famed for their careful research, must know that they are dealing in untruths and half-truths, for they are competent scholars abreast of modern historical findings"; such an author "is either knuckling under pressure from a publisher to please superpatriotic groups or, more probably, has irresponsibly let someone else choose his title for him").

[46] SEWALL, *supra* note 45, at 3.

[47] *Id.* at 28.

Loewen counters that today's American history textbooks remain infected with what a 1966 report by eminent historians called "nationalistic bias."[48] He says that despite greater sensitivity to multiculturalism, today's textbooks still seek to "inspire the children with patriotism, . . . tell the truth optimistically, . . . [and] speak chiefly of success."[49] To "get across the claim that Americans have always been exceptionally good," approved high school American history textbooks still "leave out the bad parts,"[50] even when omission means to "hide or distort."[51]

Loewen finds today's American history textbooks marked by a consistent story line:

> "As a nation, we started out great, and we've been getting better ever since—pretty much automatically. This notion of perpetual progress legitimizes ignoring anything bad Americans ever did, because in the end it turned out all right. . . . In this view, progress is what doomed the American Indian, for example, not bad things 'we' (non-Indians) did."[52]

C. Local Delivery of American History Education

Regardless of textbook content and statewide influence, high school American history instruction depends heavily on dialog actually delivered in local classrooms. This dependence recalls dictum from Thomas P. (Tip) O'Neill, former Speaker of the U.S. House of Representatives, who famously said that "all politics is local."[53] He meant that national decision making in Washington, D.C. surely influences voters, but that local happenings can influence voters even more by directly affecting their daily lives. All (or at least, much) high

---

[48] BILLINGTON ET AL., *supra* note 45, at 1–14.

[49] JAMES W. LOEWEN, LIES MY TEACHER TOLD ME 265–66 (1995) (quoting the American Legion's 1925 declaration of the "ideal textbook").

[50] LOEWEN, *supra* note 22, at 14.

[51] *Id.* at 15.

[52] *Id.* at 78. Loewen had his own introduction into efforts to "hide or distort" portions of American history when he published a "more accurate textbook of state history" in Mississippi. *Id.* at 4. Although the textbook, MISSISSIPPI: CONFLICT AND CHANGE, was lauded, the Mississippi State Textbook Board rejected it, in part, because a board member suggested a lynching photo it contained was "going to cause a race riot in the classroom." *Id.* at 4–5. Loewen sued in federal court, and the case, *Loewen v. Turnipseed*, 505 F. Supp. 512 (N.D. Miss. 1980), became one of the American Library Association's "'notable First Amendment court cases'" when the state was ordered to adopt his book for the standard period and supply it to any requesting school district. *Id.* at 5–6.

[53] TIP O'NEILL, ALL POLITICS IS LOCAL AND OTHER RULES OF THE GAME (1994); TIP O'NEILL & WILLIAM NOVACK, MAN OF THE HOUSE 26 (1987).

school history instruction is also local, dependent on the content of classroom instruction that lies largely beyond the direct supervision not only of textbook editors but also often of state education departments or governing boards.

Even where history textbooks and state curricular standards pay closer attention to multiculturalism, questions remain about how effectively this attention reaches down into high school classrooms, where some teachers and administrators may sense pressures to sanitize or avoid particular topics that might trigger complaints,[54] protests, and even efforts at book banning.[55] Where teacher performance is measured by student outcomes on standardized tests, "teaching to the test" may displace classroom attention that might otherwise be devoted to critical analysis, including the place of civility and citizenship in community life.[56]

A 2004 survey of current and recent high school students, conducted for the Pew Charitable Trusts, asked respondents to select one or two themes that their teachers had emphasized most in their middle school and high school government, civics, and American history classes. 57 The largest group of the students, at 45%, cited "the Constitution or the US system of government and how it works."58 Runners-up for most-emphasized were "great American heroes and the virtues of the American system of government" (30%); "wars and military battles" (25%); and "problems facing the country today"

---

[54] LOEWEN, *supra* note 22, at 30–32 (suggesting that teachers usually "worry needlessly" because "[i]n practice most teachers have substantial freedom").

[55] FRANCES FITZGERALD, AMERICA REVISED 30 (1980) ("The word 'controversial,' is . . . deeply feared by textbook publishers. . . . What a textbook reflects is thus a compromise, an America sculpted and sanded down by the pressures of diverse constituents and interest groups. . . . History textbooks for elementary and secondary schools. . . are essentially nationalistic histories . . . written not to explore but to instruct—to tell children what their elders want them to know about their country."); *see also, e.g.*, *Don't Blame Harper Lee*, Editorial, ADVOC. (Baton Rouge, La.), Oct. 22, 2013, at B8 (criticizing school board's ban on "To Kill a Mockingbird"); Dothan Eagle Editorial Bd., *Editorial: Banned Books Week*, DOTHAN EAGLE (ALA.), Sept. 27, 2013, http://www.dothaneagle.com/news/editorials/editorial-banned-books-week/article_468aebc8-278c-11e3-9e62-0019bb30f31a.html, <http://perma.cc/M3HV-ZSVC> ("[C]hallenges and bans continue, with more than 11,300 books challenged since 1982, according to the American Library Association. . . . The concepts of freedom and liberty, alongside the words 'banned books,' create a marked contradiction to our nation's philosophical underpinnings. Perhaps a better approach for those who take issue with important works over content they find objectionable would be to more closely guide their children and young teenagers in their reading choices, and inform themselves about the content of particular works beforehand.")

[56] William J. Reese, *The First Race to the Top*, N.Y. TIMES, Apr. 21, 2013, at SR8 (asserting that "[t]esting yields essential, valuable knowledge about school performance, but its exaggerated use distorts teaching and ignores the broader purpose of education," including "teaching norms of civility and good citizenship.").

[57] Press Release, Pew Charitable Trusts, US Gov't and History Classes Emphasize Fundamentals, Heroes, and Virtues (Mar. 10, 2004).

[58] *Id.*

(11%).59 The theme in last place, trailing all other discrete themes, was "racism and other forms of injustice in the American system," whose response rate registered only 9%.60

III. REACTING LOCALLY TO STUDENT INTOLERANCE

Deficiencies in local delivery of American history curricula quickly became evident at Phillipsburg, McAdory, and Dyersburg High Schools. Officials apologized for the wrestling and football photographs and disavowed their messages.[61] The Phillipsburg school district announced that it was "taking steps to educate the entire student body as to the culture and expectations" of the district.[62] The Paulsboro school superintendent whose wrestling team was the target of the racially-charged noose photo, said that the incident "provides the opportunity in our U.S. history classes and other classes [to] . . . talk about" lynching.[63] Publicity about McAdory's football bust-through banner led the high school's principal to request social studies teachers in all grades to present a special unit about the Trail of Tears.[64] Dyersburg's principal promised to "educate [students] through our social studies department. . . . We've taught [students] this week that [the Trail of Tears] was a sad event in the history for Native Americans and in our country's history that resulted in the deaths of thousands of people."[65]

Officials at the three high schools demonstrated empathy for past victims, recognition of present sensibilities, and appreciation for civility and citizenship. The schools' American history classes, however, should have been teaching students about lynching and the Trail of Tears all along, and not beginning only that particular week.[66]

---

[59] *Id.*

[60] *Id.*

[61] Angelo Fichera, *Paulsboro Ends Wrestling Rivalry Over Racially Charged Photo*, PHILA. INQUIRER, May 3, 2014, at B1; FOX 6 WBRC, *McAdory High School Apologizes for Trail of Tears Sign* (Nov. 25, 2013), http://www.wsfa.com/story/24001310/mcadory-high-school-apologizes-for-trail-of-tears-sign, <http://perma.cc/DWG6-UXX7>.

[62] Angelo Fichera & Rita Giordano, *Wrestling Team Without Half Its Members After Controversial Photo*, PHILA. INQUIRER, Feb. 21, 2014, at B1.

[63] Benevento, *supra* note 1 (quoting Paulsboro school superintendent).

[64] *High School Forced to Apologize*, *supra* note 19.

[65] Shields, *supra* note 6 (quoting Dyersburg principal).

[66] *See, e.g.*, Jen Chung, *NJ State Officials Investigating Students' Disturbing 'Lynching' Photo*, GOTHAMIST, Feb. 20, 2014 ("[I]f ignorance is a basis for the students to claim innocence of racism, it's a strong indictment of what they are being taught—and not being taught—up there in Phillipsburg."); Bob Ingle, *Never Forget Our Inhumanity to Native Americans*, ASBURY PARK PRESS (N.J.), Nov. 29, 2013 ("Having a month each year to study and appreciate what Native Americans— and all minorities—have meant to our nation is a good thing. But having the true history, the real story of their struggles, contributions and horrific atrocities suffered be a permanent

A. Lynching

Forthright classroom discussion about lynching would have taught the Phillipsburg wrestlers that nearly 3,500 African Americans (and some whites)[67] were summarily hanged, shot, mutilated,[68] castrated,[69] or burned at the stake,[70] by vigilantes between 1882 and 1968,[71] mostly from 1882 to 1920,[72] and mostly in the South.[73] Crowds often gathered approvingly to watch victims dangle and suffocate, and onlookers, including children, would sometimes cut off body parts as souvenirs,[74] or willingly pose for photographs in front of the mutilated body.[75] "Often . . . the mob posed for the camera. They showed no fear of being identified because they knew no white jury would convict them."[76]

Each day of their lives, black men, women, and children left home knowing that their survival might depend on the whims of a lawless mob and a rope.[77] Most of the black victims were guilty of nothing other than appearing to upset the Jim Crow racial caste system or looking at a white person, particularly a white woman, the wrong way.[78] No lynching victim was guilty of anything that warranted summary unpunished private execution in a nation otherwise committed to due process and to "Equal Justice Under Law," the credo that adorns the entrance of the Supreme Court Building in Washington, D.C.[79] "Lynching . . . has always had a special power to make us want to look the other way," says one historian.[80] The extralegal executions were "grisly and inhumane acts of cruelty" whose "victims were chosen for their race and put to

---

part of U.S. history taught in our education system is way better.")

[67] *Lynchings: By State and Race, 1882–1968*, Statistics from Tuskegee Institute Archives, http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingsstate.html, <http://perma.cc/GST5-KUJU>.

[68] PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 17–18, 81 (2002).

[69] *Id.* at 81.

[70] *Id.* at 78, 81.

[71] *Lynchings: By State and Race, 1882–1968*, *supra* note 67.

[72] *See generally* MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874–1947, at Appendix (2004) ("Confirmed Lynchings and Near-Lynchings, 1874–1947").

[73] *See id.* at 13–14 (showing statistics); *Lynchings: By State and Race, 1882–1968*, *supra* note 67 (showing statistics).

[74] DRAY, *supra* note 68, at 17–18, 81.

[75] LOEWEN, *supra* note 22, at 6 (showing lynching photo).

[76] *Id.*

[77] *See* DRAY, *supra* note 68, at xi ("Regardless of any statistics, it is a living memory to most black Americans that their forebears were lynched and routinely subjected to violence and intimidation, and that they lived in almost constant fear of seeing a loved one lynched or of being targeted themselves.").

[78] *Id.* at x.

[79] *Id.* at 18.

[80] *Id.* at xii.

death in specific defiance of reasonable values of fairness or decency."[81]

B. The Trail of Tears

With forthright classroom discussion, McAdory and Dyersburg students would have learned that shortly after Congress passed the Indian Removal Act of 1830, federal authorities began forcibly removing more than 100,000 Cherokees and members of other Native American tribes from their homes in the southeastern United States, land that whites coveted.[82] Acting on presidential orders throughout the 1830s, culminating in 1838–1839, federal authorities placed the Indians in internment camps, confiscated their homes and property, and then forced them to brave the elements for hundreds of miles, marching with little but the clothes on their backs to what is now Oklahoma.[83] Some 15,000 men, women, and children died of starvation and disease while their American commanders watched.[84]

After seeing combat in the Civil War, a Georgia soldier shared this personal perspective about the Trail of Tears: "I fought through the civil war and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew."[85]

IV. TEACHABLE MOMENTS FOR EDUCATIONAL POLICYMAKERS

The nationally publicized Phillipsburg, McAdory, and Dyersburg incidents are themselves now history, waiting for administrators and classroom teachers at these and other high schools to teach themselves about how to teach American history to their students. For educators and students in a nation proud of its heritage, the ripest lesson is that states

---

[81] *Id.*

[82] GLORIA JAHODA, THE TRAIL OF TEARS: THE STORY OF THE AMERICAN INDIAN REMOVALS 1813–1855 (1975); Elizabeth Prine Pauls, *Trail of Tears*, ENCYCLOPEDIA BRITANNICA (last updated Jul. 18, 2014), http://www.britannica.com/EBchecked/topic/602008/Trail-of-Tears, <http://perma.cc/J2KA-MBXU>.

[83] *Id.*

[84] *See, e.g.*, DAVIS, *supra* note 30, at 168–70 ("The tidy word given this policy [by the U.S. government] was 'removal,' suggesting a sanitary resolution of a messy problem, an early nineteenth-century equivalent of the Third Reich's 'final solution.' The Indians called it the Trail of Tears."); Pauls, *supra* note 82 (noting that approximately 100,000 indigenous people were forced to move west—with tribal and military records suggesting some 15,000 deaths— while "[b]ureaucratic ineptitude and corruption caused many [in one tribe] to die from exposure, malnutrition, exhaustion, and disease while traveling.").

[85] RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 101 (1975).

should not shrink from high school classroom instruction that encourages frank student dialogue about troublesome aspects of the past.[86]

Other nations, including Russia and Japan, have faced condemnation from Americans and others for alleged systemic whitewashing of the history they teach young people. Russia has been challenged for trying to recast Soviet history.[87] Japan has been challenged for avoiding treatment of such World War II atrocities as the rape of Korean "comfort women;" the treatment of prisoners of war at Bataan and other places; and the wholesale plunder of Koreans, Chinese, and others throughout the Pacific.[88]

In the United States, the recent Phillipsburg, McAdory, and Dyersburg "teachable moments" should encourage high schools to reject similar systemic avoidance because grappling with uncomfortable recollections can strengthen national resolve to pursue a better future. "[A]ny healthy democracy," explains historian Gordon S. Wood, "has to have a certain amount of self-criticism, and that often takes the form . . . of writing critically about the past."[89]

"One of history's most useful tasks," adds British writer John Carey, "is to bring home to us how keenly, honestly and painfully, past generations pursued aims that now seem to us wrong or disgraceful."[90] Learning or teaching about something "wrong or disgraceful" is a sign of strength, and not weakness, because the lessons acknowledge that the

---

[86] *See* LOEWEN, *supra* note 22, at 14 ("Our national past is not so bad that teachers must protect students from it. . . . 'We can afford to present ourselves in the totality of our acts.'") (quoting historian Paul Gagnon); *see also High Schoolers Protest Conservative Proposal*, CBS NEWS, SEPT. 24, 2014, http://www.cbsnews.com/news/colorado-high-schoolers-protest-conservative-proposal/, <http://perma.cc/HN29-84NR> (discussing high school students' protest of local school board proposal that "calls for instructional materials that present positive aspects of the nation and its heritage. It would establish a committee to regularly review texts and course plans, starting with Advanced Placement history, to make sure materials 'promote citizenship, patriotism, essentials and benefits of the free-market system, respect for authority and respect for individual rights' and don't 'encourage or condone civil disorder, social strife or disregard of the law.'").

[87] ERIC FONER, WHO OWNS HISTORY? RETHINKING HISTORY IN A CHANGING WORLD 75–87 (2002); *see also* Ben Hoyle, *Putin Rewrites Russian History*, THE AUSTRALIAN, Nov. 21, 2013, at 9 ("A new history textbook ordered by President Vladimir Putin for every Russian schoolchild has been attacked as a distortion of history. Critics said it appeared to be a fresh attempt to rehabilitate the country's Soviet past.").

[88] *See, e.g.*, Editorial, *Politicians and Textbooks*, N.Y. TIMES, Jan. 13, 2014, http://www.nytimes.com/2014/01/14/opinion/politicians-and-textbooks.html?_r=0, <http://perma.cc/L9NN-ZD8Q> (in Japan and South Korea, "dangerous efforts to revise [high school] textbooks threaten to thwart the lessons of history"); FONER, *supra* note 87, at xvi (highlighting demonstrations in Japan to protest new textbooks that "sanitize[d] the country's aggression in World War II and its maltreatment of occupied peoples such as the Koreans and Chinese").

[89] *Booknotes: The American Revolution: A History* (C-Span television broadcast Apr. 21, 2002) (interview with Wood), *available at* http://www.booknotes.org/Watch/168964-1/Gordon+Wood.aspx, <http://perma.cc/545F-7N9N>.

[90] MARGARET MACMILLAN, DANGEROUS GAMES: THE USES AND ABUSES OF HISTORY 169 (2009) (quoting Carey); *see also, e.g.*, DAVIS, *supra* note 30, at xx ("Every country has its share of nightmarish moments it would like to forget or erase.").

United States is a better nation today, ascendant when we confront past mistakes without fear or favor.

Historian Dixon Wecter said that "history . . . when honestly used helps enormously to splinter those barriers of prejudice and explode those lies which create hatred between races, sections, and national groups."[91] "Honest history is the weapon of freedom,"[92] wrote historian Arthur M. Schlesinger, Jr., because "[t]he great strength of history in a free society is its capacity for self-correction."[93]

The enduring lesson should be that each generation enhances its capacity for self-correction when educators present both past triumphs (of which our nation has plenty) and past tragedies such as lynching and the Trail of Tears.[94] Presentation belongs in high schools because "five-sixths of all Americans never take a course in American history after they leave high school. What our citizens learn there forms the core of what they know of our past."[95] Forthright classroom exploration might have prodded students at Phillipsburg, McAdory, and Dyersburg High Schools to think twice before publicly festering open wounds in the name of school spirit.

V. CONCLUSION

In an editorial condemning the Phillipsburg noose photograph, the *South Jersey Times* expressed disbelief: "It's hard to believe that the [student wrestlers] . . . would not know by the time they're in high school the ugly history of lynching of black people in America and particularly the South."[96] The *Times* was wrong. It is not hard at all to believe the level of ignorance of American history—particularly of "ugly history"—among today's high school students.

---

[91] Dixon Wecter, *How to Write History*, *in* A SENSE OF HISTORY 38, 39 (1985); *see also id.* at 40 ("The American record is not flawless, as we all know. . . . But on the whole, from the Founding Fathers on, the American panorama is one that we need not blush to own, one in which we may often take hearty pride.").

[92] ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 52 (1992).

[93] Arthur M. Schlesinger, Jr., Op-Ed., *Folly's Antidote*, N.Y. TIMES, Jan. 1, 2007, http://www.nytimes.com/2007/01/01/opinion/01schlesinger.html, <http://perma.cc/QNE4-GN3F>.

[94] LOEWEN, *supra* note 22, at 15 ("Telling the truth about the past can help us make it right from here on.").

[95] *Id.* at 10–11.

[96] South Jersey Times Editorial Board, Editorial, *Racism Or Not, Phillipsburg Wrestling Photo Was Wrong*, S. JERSEY TIMES, Feb. 20, 2014, http://www.nj.com/opinion/index.ssf/2014/02/editorial_racism_or_not_phillipsburg_wrestling_photo_was_wrong.html, <http://perma.cc/8FZ9-QWBQ>.

Making *Turner* a Reality—Improving Access to Justice Through Court-Annexed Resource Centers and Same Day Representation

Stacy L. Brustin*

I. INTRODUCTION

In *Turner v. Rogers*,[1] the Supreme Court returned, after many years, to the issue of whether there is a right to counsel in civil cases.[2] The case focused on the due process rights of litigants who face the possibility of incarceration in a civil contempt proceeding for failure to pay child support.[3] The Court held that the Fourteenth Amendment's Due Process Clause does not require the state to appoint counsel for an indigent defendant facing incarceration in a civil contempt action so long as "alternative procedural safeguards" are in place.[4] These alternative procedural safeguards must ensure that litigants have adequate notice of the "ability to pay standard,"[5] a fair opportunity to present and dispute evidence, and a decision with clear findings on the issue of ability to pay.[6] The Court limited its holding to cases in which a pro se petitioner initiates the contempt proceeding, and suggested that in cases brought by government attorneys, appointment of counsel may be required.[7]

While the right to appointed counsel for indigent defendants in criminal cases is a long established constitutional right,[8] the question of whether indigent defendants in civil cases are entitled to appointment of counsel has been the subject of debate and concern.[9] In *Lassiter v.*

---

* Stacy Brustin is an Associate Professor of Law at The Catholic University of America, Columbus School of Law. She is the co-director of the General Practice Clinic of Columbus Community Legal Services, where she represents low-income clients in a variety of civil matters, including paternity and child support litigation. She is a Commissioner on the D.C. Child Support Guideline Commission. B.A., Tufts University; J.D., Harvard Law School. The author would like to thank Jeff Gutman for his insightful comments on drafts of this Article as well as Ariana Awad and Emily Shinogle for their research assistance.

[1] 131 S.Ct. 2507 (2011).

[2] *See* Lassiter v. Dep't. of Soc. Servs, of Durham Cnty., N.C., 101 S.Ct. 2153, 2162 (1981) (holding that the Due Process clause of the Fourteenth Amendment does not require courts to appoint counsel to indigents in every parental termination proceeding).

[3] *Turner*, 131 S.Ct. at 2507.

[4] *Id.* at 2520.

[5] *Id.* at 2513.

[6] *Id.* at 2520.

[7] *Id.*

[8] *Turner*, 131 S.Ct. at 2515.

[9] *See id.* at 2514 (recognizing that various state and federal courts have conflicting holdings regarding the right to counsel in civil contempt proceedings).

Department of Social Services,[10] the Supreme Court held that pro se indigent parents in termination of parental rights proceedings were not, as a constitutional matter, entitled to appointment of counsel.[11] *Lassiter* exemplifies the quandary that indigent litigants face when trying to represent themselves in court proceedings that affect matters of fundamental importance, such as whether they will lose their rights to parent their children.[12] The stakes of many civil cases are arguably much higher than those of criminal cases for which counsel is appointed.[13] Yet, indigent litigants are left to advocate for themselves without the benefit of counsel, regardless of the complexity of the case or the stakes at issue. Lawyers who provide legal services and other advocates for low income communities have long argued for legislative and court reform that would guarantee indigent litigants the right to appointment of counsel in high stakes civil matters.[14]

The *Turner* case does not go so far as to hold that indigent defendants are entitled to counsel in civil child support contempt proceedings. However, the decision provides litigants more protection in high stakes civil matters by requiring that alternative procedural safeguards be in place to ensure a fair hearing.[15] In addition, the Court recognized that balance of power is a consideration in determining whether appointment of counsel might be required and limited its holding in *Turner* to situations in which a pro se petitioner has initiated the child support contempt proceeding case as opposed to the state.[16] The Court leaves open the possibility that if the state were initiating the case and government lawyers were litigating against a pro se defendant, due process might require appointment of counsel.[17]

---

[10] 101 S.Ct. 2153 (1981).

[11] *Id.* at 2162 ("[We can not] say that the Constitution requires the appointment of counsel in every termination proceeding. . . . [We] leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered . . . by the trial court, subject, of course, to appellate review.").

[12] *See* Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 638–40 (2005–2006) (noting the prejudicial effect arising out of Lassiter's lack of understanding of legal concepts and proceedings while proceeding pro se).

[13] John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 HUM. RTS. MAG. 4 (2013), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/its_all_about_justice.html, <http://perma.cc/XW69-C22Q> ("[I]n the end, litigants do not care whether their proceeding is labeled 'criminal' or 'civil; they care about what they stand to lose. And what they stand to lose in basic human needs civil cases is every bit as precious as that at stake in most criminal cases.").

[14] *See* Clare Pastore, *A Right to Civil Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1067–68 (2009) (noting the support by national, state, and local bar associations for a guaranteed right to counsel for indigent defendants in cases involving basic human needs).

[15] *Turner*, 131 S. Ct. at 2519.

[16] *Id.* at 2520.

[17] *See id.* (observing that the average defendant lacks the legal knowledge and skill needed to protect himself against an experienced prosecutor).

In the wake of *Turner*, courts, legislatures, and state child support offices have grappled with the question of what constitutes adequate procedural safeguards in lieu of appointed counsel in civil contempt proceedings.[18] In order to support pro se litigants in civil proceedings, states use a variety of approaches, ranging from providing standardized forms and written explanations, to limited-advice services and same-day representation models.[19] In 2011, two non-profit legal service agencies in Washington D.C. instituted the Child Support Community Legal Services Project ("CSCLSP" or "Child Support Community Project") to staff the Child Support Resource Center at the D.C. Superior Court.[20] Approximately 98% of respondents in paternity and child support matters appear pro se in D.C. Superior Court, yet almost all of these cases are initiated and prosecuted by the D.C. Office of the Attorney General.[21] Historically, litigants were generally unaware of their rights and had minimal access to attorneys.[22] The Child Support Community Project fills this critical gap by providing information, limited advice, and same-day representation to unrepresented individuals.[23] CSCLSP offers a model for providing the "alternative procedural safeguards" that the Court in *Turner* deemed necessary to protect the due process rights of pro se litigants.

This Article will propose recommendations for implementing meaningful "alternative procedural safeguards." It will highlight a program that uses an innovative model of pro se assistance and limited representation, and will discuss the limitations that even the most innovative programs face in trying to offer adequate alternatives to full

---

[18] *See* Action Transmittal, Office of Child Support Enforcement, to State Agencies Administering Child Support Enforcement Plans under Title IV-D of the Social Security Act and Other Interested Individuals, "Turner v. Rogers Guidance" (June 18, 2012), *available at* http://www.acf.hhs.gov/programs/css/resource/turner-v-rogers-guidance, <http://perma.cc/SE2T-E4ZA?type=source> (describing changes to be implemented by state agencies administering child support enforcement plans under Title IV-D of the Social Security Act in response to *Turner*).

[19] *See Child Support: Know Your Rights*, LAWHELPNY.ORG (2014), http://www.lawhelpny.org/issues/family-juvenile/child-support?location=New%20York%20City%20(all%205%20NYC%20boroughs, <http://perma.cc/WL43-Q7BZ> (providing information on child support proceedings in New York); *Family*, MARYLAND LEGAL AID (2014), http://www.mdlab.org/get-help-services/family, <http://perma.cc/T2P6-JGBD> (listing resources for family law matters, including a pro se self-help information center).

[20] *Special Projects*, LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA (2013), http://www.legalaiddc.org/special-projects/, <http://perma.cc/G3XB-665A>.

[21] D.C. ACCESS TO JUST. COMM'N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW-INCOME COMMUNITY 7 (2008) *available at* http://dcaccesstojustice.org/files/CivilLegalNeedsReport.pdf, <http://perma.cc/YN5K-H922>.

[22] *See* Meridel Bulle-Vu, *The Paternity and Child Support Courthouse Project in Pilot Phase*, MAKING JUSTICE REAL (Aug. 15, 2011), http://www.makingjusticereal.org/the-paternity-and-child-support-courthouse-project-in-pilot-phase, <http://perma.cc/F5BY-KPD5> (describing the prominence of pro se litigants who are often unaware of their legal rights).

[23] *Legal Assistance*, BREAD FOR THE CITY, http://www.breadforthecity.org/services/legal-clinic/, <http://perma.cc/Q3NR-CTZT>.

representation. The Article will also analyze the ethical obstacles that court-based assistance programs face, and offer strategies that attorneys can use to meet their ethical duties regarding confidentiality, competence, avoidance of conflicts of interest, and independence of professional judgment.

While the procedural safeguards that the Court suggests in *Turner* might, in theory, improve litigants' understanding and ability to participate in child support matters, they do not, in practice, provide the level of due process protection in lieu of appointed counsel that the Court suggests.[24] The Article concludes that the broad brush the Court uses in *Turner* to paint the concept of procedural safeguards is inadequate, and the legal community must develop guidelines and programs that offer progressive tiers of services tailored to litigants' circumstances to ensure that the due process rights of pro se litigants are protected.

II. THE *TURNER* DECISION AND RIGHT TO COUNSEL IN CIVIL MATTERS

The *Turner* case is the latest in a line of procedural due process cases focusing on representation of indigent litigants. In *Gideon v. Wainwright*,[25] the Supreme Court held that indigent criminal defendants are entitled to appointment of counsel at state expense under the Due Process Clause of the Fourteenth Amendment.[26] The holding was limited to criminal defendants and did not extend the right to appointed counsel to civil litigants.[27]

Following *Gideon*, the Court clarified in *Argersinger v. Hamlin*[28] and *Scott v. Illinois*[29] that counsel must be appointed in criminal cases not only in which incarceration is an authorized or potential penalty, but also in which the defendant will actually be imprisoned if convicted.[30] In

---

[24] *See* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 40 (2013) ("The cautious optimism flowing from the portions of *Turner* that lay the groundwork for increased access is tempered by the fear that the promise is illusory. . . .[the Court's analysis in *Turner*] can serve as a veneer 'to mask the lack of genuine empiricism.'") (quoting Judith Resnick, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 158 (2011)).

[25] 372 U.S. 335 (1963).

[26] *Id.* at 342.

[27] *Id.* at 348 ("[T]hat the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from this Court's interpretation.") (Douglas, J., concurring).

[28] 407 U.S. 25 (1972).

[29] 440 U.S. 367 (1979).

[30] *See id.* at 373. ("[W]e conclude today that *Argersinger* did indeed delimit the constitutional right to *appointed* counsel in state criminal proceedings. Even were the matter *res nova*, we believe that

Scott, the defendant was charged with theft and fined $50 at the conclusion of a bench trial.[31] The Supreme Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[32]

In *Lassiter v. Department of Social Services*, the most prominent "civil *Gideon*" case preceding *Turner*, the Supreme Court held that the threshold issue for whether or not counsel must be appointed in civil proceedings is whether the physical liberty of the defendant is at risk.[33] If physical liberty is in jeopardy—that is, where the client may be at risk of being incarcerated—then there is a presumption that counsel must be appointed.[34] However, where physical liberty is not at issue, the trial court must engage in the *Mathews v. Eldridge*[35] balancing test to determine what level of process is due, weighing the interests of the individual, the interests of the state, and the risk of erroneous deprivation of rights absent appointment of counsel.[36] In *Lassiter*, the Court held that there is no blanket right to counsel in civil termination of parental rights cases—despite the gravity of the issue at stake—and that courts should make these determinations on a case-by-case basis.[37]

In *Turner v. Rogers*, the Court turned to the question of whether the Due Process Clause of the Fourteenth Amendment requires the state to appoint counsel in a civil contempt hearing to an indigent defendant who is facing possible incarceration if found liable for failure to pay child support.[38] A South Carolina family court had issued an order requiring Michael Turner to pay $51.73 per week in child support to Rebecca Rogers.[39] Over a period of three years, Turner failed to pay the support owed, and the court held him in civil contempt of the order five times.[40]

---

the central premise of *Argersinger* —that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.") (emphasis added).

[31] *Id.* at 367.

[32] *Id.* at 373–74. *See also* Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand *of counsel*' in the prosecution for the crime charged.") (quoting *Argersinger,* 407 U.S. at 40.) (internal quotation marks omitted) (emphasis added).

[33] Lassiter v. Dep't. of Soc. Servs, of Durham Cnty., N.C., 101 S.Ct. 2153, 2159 (1981).

[34] *Id.*

[35] 424 U.S. 319 (1976).

[36] *Lassiter*, 452 U.S. at 2159. *See also Mathews*, 424 U.S. at 335 (laying out the three factors of the due process balancing test: the private interest affected by the official action, the risk of an erroneous deprivation of the private interest, and the government's interest).

[37] *Lassiter*, 452 U.S. at 2159.

[38] Turner v. Rogers, 131 S.Ct. 2507, 2512 (2011).

[39] *Id.* at 2513.

[40] *Id.*

On four of these occasions, the trial court sentenced Turner to ninety days of incarceration, but he paid the amount due and spent little or no time in jail.[41] The fifth time he was held in contempt, Turner did not pay the amount owed and served a six-month sentence.[42] Ms. Rogers initiated a sixth civil contempt action, which was adjudicated in 2008.[43] Neither Mr. Turner nor Ms. Rogers were represented by counsel.[44] During the brief hearing, Turner attempted to explain that he was unable to pay support on account of a drug addiction relapse, as well as an injury he sustained at his place of employment.[45] However, the trial court found Turner in civil contempt of court and sentenced him to twelve months in jail.[46] The court informed Turner that he could purge himself of the contempt and avoid going to jail if he paid close to $6,000 in child support arrears.[47]

However, the trial court failed to make a finding that Turner had the ability to pay the order.[48] The Supreme Court later pointed out that the trial court failed to engage in this "ability to pay" analysis and did not make an express finding that Turner had the ability to pay the purge amount set.[49] At trial, the judge issued a form order, which had a space to allow the fact-finder to indicate whether the defendant was employed and whether the defendant had the ability to pay.[50] However, the judge did not fill in this portion of the form order.[51] Turner appealed the family court decision claiming that he had a constitutional right to appointment of counsel in the civil contempt proceeding.[52] The South Carolina Supreme Court rejected this claim, and Turner appealed to the U.S. Supreme Court.[53]

The Court clarified that in a civil contempt proceeding, an individual can only be held in contempt if the court finds that the person has the ability to comply with the order.[54] Further, the court must find that the contemnor has the means to purge himself of contempt and forego incarceration by complying with the terms of the court's order.[55]

---

[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Turner v. Rogers, 131 S.Ct. 2507, 2513 (2011).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Turner v. Rogers, 131 S.Ct. 2507, 2514 (2011).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 2516 (citing Hicks v. Feiock, 485 U.S. 624, 638 (1988)).
[55] *Id.*

Therefore, "where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case."[56]

As in *Lassiter*, the *Turner* Court engaged in the balancing analysis outlined in *Mathews v. Eldridge,* to determine whether due process requires appointment of counsel in civil contempt proceedings.[57] The Court weighed the nature of the private interest at stake (here, the indigent litigant's potential loss of physical liberty as a result of incarceration) with the risk of an "erroneous deprivation" with or without adequate procedural safeguards.[58] The Court also considered the nature of "any countervailing interest in not providing 'additional or substitute procedural requirements'" (i.e. the interests of the pro se petitioner, Ms. Rogers, if counsel were appointed for Mr. Turner).[59]

The Court acknowledged that the private interest at stake suggests the need for a right to counsel, particularly to ensure that the trial court has the means to carefully and accurately assess the key issue of whether the defendant has the ability to pay the order.[60] However, the Court emphasized that the Due Process Clause has not always required appointment of counsel in civil proceedings in which incarceration was a possible outcome,[61] and therefore asserted that "opposing interests" and "the probable value of 'additional or substitute procedural safeguards'" must also be taken into account.[62]

In order to take account of opposing interests and the value of alternative procedural safeguards, the Court focused on three factors. First, the court examined the nature of the "ability to pay" standard and determined that it is largely a question of whether or not the defendant is indigent.[63] The Court posited that this determination is not unduly complex and, in fact, is a relatively straightforward issue to assess.[64]

Second, the Court evaluated the impact that appointing an attorney for Mr. Turner would have on the pro se plaintiff, Ms. Rogers.[65] The Court noted that appointing an attorney for Turner could create "an

---

[56] Turner v. Rogers, 131 S.Ct. 2507, 2516 (2011).

[57] *Id.* at 2517. *See also* Lassiter v. Dep't. of Soc. Servs, of Durham Cnty., N.C., 101 S.Ct. 2153, 2159 (1981) (laying out the *Mathews* balancing test).

[58] *Turner*, 131 S.Ct. at 2517–18.

[59] *Id.*

[60] *Id.* at 2518.

[61] *Id.* (citing Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (holding that a defendant in a civil probation revocation hearing facing possible imprisonment was not entitled to appointment of counsel).

[62] Turner v. Rogers, 131 S.Ct. 2507, 2518 (2011) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[63] *Id.* at 2518–19.

[64] *Id.*

[65] *Id.* at 2519.

asymmetry of representation" that could delay the process and ultimately slow child support payments to the family in need of support.[66] According to the Court, appointment of counsel for alleged contemnors "could make the proceedings *less* fair overall"[67] because counsel would increase "the risk of a decision that would erroneously deprive a family of the support it is entitled to receive."[68] The Court implies that if attorneys were appointed, they could use their knowledge of the substantive law and process to manipulate the result so that a defendant would prevail in the contempt action and avoid paying support.[69] There is no empirical evidence offered to support this proposition.[70] The Court also fails to acknowledge that one option for addressing this imbalance would be to appoint counsel for the plaintiff.[71]

The third factor the Court considered is whether there are alternative procedural safeguards available, which, "if employed together, can significantly reduce the risk of an erroneous deprivation of liberty."[72] The Court suggested that notice to the defendant explaining the "ability to pay" standard, preprinted forms designed to elicit information about the defendant's financial resources, opportunities at the hearing for the defendant to answer questions related to his financial circumstances, and explicit findings by the court on the issue of the defendant's ability to pay are the types of procedural safeguards necessary to satisfy due process.[73] However, while the Court accepted that "the Government . . . claim[s] that these alternatives can assure the 'fundamental fairness' of the proceeding even where the State does not

---

[66] *Id. But see* John P. Gross, *The True Benefits of Counsel: Why "Do-It-Yourself" Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV 1, 20–21 (2013) (pointing out that, in civil contempt proceedings for nonpayment of child support, "the custodial parent already has a judgment against the noncustodial parent, and he or she is merely asking for its enforcement.").

[67] *Id.* The court does not explain the rationale behind this conclusion.

[68] Turner v. Rogers, 131 S.Ct. 2507, 2519 (2011).

[69] *See id.* (noting that appointment of attorneys for the defendant only could reduce overall fairness by erroneously eliminating a legitimate claim for child support); Bruce Green, *A Professional Responsibility Perspective on* Turner v. Rogers, CONCURRING OPINIONS (June 22, 2011), http://www.concurringopinions.com/archives/2011/06/a-professional-responsibility-perspective.html, <http://perma.cc/3SWE-DU6X> (stating that the *Turner* opinion brings to mind "the stereotype of the crafty lawyer engaging in sly tactics to distract jurors from the truth.").

[70] *See* Judith Resnick, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 175 HARV. L. REV. 79, 93 (2011) (arguing that the *Turner* case is the product of "judge-made balances of procedural costs and benefits" in which the court "invoke[s] the resources of the opponent as a justification for limiting procedural rights for claimants."); *see also* Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 805–06 (2012) (suggesting that *Lassiter* and *Walters*, like *Turner*, "rely on the Justices' intuitions regarding the abilities of pro se litigants, even in the face of evidence to the contrary.").

[71] *See* Engler, *supra* note 24, at 33 (highlighting the Court's reasoning that appointing counsel to the non-custodial parent respondent in a proceeding where petitioner is self-represented "could make the proceedings *less* fair overall.").

[72] Turner v. Rogers, 131 S.Ct. 2507, 2519 (2011).

[73] *Id.* at 2519.

pay for counsel for an indigent defendant," it failed to recognize that the state often initiates contempt proceedings against pro litigants. The Court neither questions the reliability of the state's position, nor relies on other empirical evidence in support of the state's conclusion.[74]

The Court held that the Due Process Clause does not "automatically" require appointment of counsel in civil contempt proceedings where incarceration is a possible remedy for a contempt finding.[75] The Court limited its holding to situations in which the opposing parent or party is proceeding pro se and where sufficient alternative procedural safeguards are provided.[76] The Court specifically noted that its decision does not address civil contempt proceedings where the child support is owed to the state and the state is likely to be prosecuting the action.[77] The Court also stated that it was not addressing "what due process requires in an unusually complex case where a defendant can fairly be represented only by a trained advocate."[78] The Court then found that Michael Turner did not have access to adequate alternative procedural safeguards and, therefore, the contempt process in his case violated the Due Process Clause.[79] The decision of the South Carolina Supreme Court was vacated and the case remanded.[80]

The *Turner* decision, while not mandating appointment of counsel in civil contempt cases, recognizes that due process requires that pro se litigants have access to alternative procedural safeguards and recognizes that there are complex cases in which appointed counsel would be required.[81] The case advances the jurisprudence on appointment of counsel in civil matters: while *Lassiter* suggested that even in high-stakes civil cases (termination of parental rights), there is no due process requirement that counsel be appointed, the Court in *Turner* recognized that, at a minimum, procedures must be in place to ensure that defendants are informed of the threshold issues, given means to develop evidence, provided fuller opportunities for hearing, and assured of explicit findings in written decisions.[82]

---

[74] *Id.* at 2520.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* (internal quotation omitted).
[79] Turner v. Rogers, 131 S.Ct. 2507, 2520 (2011).
[80] *Id.*
[81] *Id.*
[82] Lassiter v. Dep't. of Soc. Servs, of Durham Cnty., N.C., 101 S.Ct. 2153, 2159 (1981); *Turner*, 131 S.Ct. at 2520. *See also* Resnick, *supra* note 70, at 82 (identifying "four distinct ideas" which have emerged from the Court's due process jurisprudence, including "procedural inadequacies in decision[-]making, asymmetrical resources of adversaries, disparities among co-litigants, and lack of access to courts," and adding that *Turner* and two other 2011 decisions added a fifth idea—"public processes"—to the factors being considered in due process cases).

The *Turner* case, however, leaves many questions unresolved about what constitutes an adequate procedural safeguard. The Court almost casually ticks off a list of proposed safeguards—such as standardized, fill-in-the-blank financial statements—without drawing on empirical evidence that such forms actually contribute to a full and fair hearing.[83] Further, the Court fails to define or identify criteria to determine what would constitute "an unusually complex case where a defendant can fairly be represented only by a trained advocate."[84] The Court's suggestion reflects that the threshold issue in *Turner* was straightforward reflects that the Court did not appreciate the complexity of many paternity and child support cases, including civil contempt actions for failure to pay support.[85] *Turner* leaves these questions to state legislatures and trial courts to resolve.[86]

III. STATE INITIATIVES ON RIGHT TO COUNSEL IN CIVIL MATTERS

A number of state legislatures, courts, and bar associations have undertaken studies or implemented pilot programs to identify the types of legal assistance needed to ensure due process in civil matters.[87] States experimenting with a civil right to counsel have developed criteria to determine the degree of legal assistance needed given the complexity of the matter.[88]

In 2009, for example, the California Legislature passed the Sargent Shriver Civil Counsel Act to address the issue of access to representation in civil cases.[89] The Act noted that "[e]ven if we have fair laws and an

---

[83] *Turner*, 131 S.Ct. at 2519.

[84] *Id.* at 2520 (internal quotation omitted). *See also* Gross, *supra* note 66, at 17 ("[T]he line between indigenc[e] and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from state to state and often resulting in serious inequities to accused persons.")(quoting Argersinger v. Hamlin, 407 U.S. 25, 50 (1972) (Powell, J., concurring)).

[85] *Id.*

[86] *See id.* at 2512 (asserting that though "the State need not provide counsel to the noncustodial parent . . . we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question," without specifying further what procedures are necessary).

[87] *See, e.g.*, Sargent Shriver Civil Counsel Act, CAL. GOV'T. CODE § 68651 (West 2012) (expanding civil litigants' access to counsel); NEW HAMPSHIRE LEGAL ASSISTANCE, CIVIL LEGAL SERVICES AND THE "WORKING POOR" PILOT PROJECT (2006) *available at* http://www.nlada.org/DMS/Documents/1236007823.5/Civil%20Legal%20Services%20%26%20Working%20Poor%20-%20Nov.%202006%20complete.pdf, <http://perma.cc/3KZ5-79W8> (describing New Hampshire's "Working Poor Pilot Project," which looks to address the problem of a lack of access to counsel in civil matters).

[88] *E.g.*, Sargent Shriver Civil Counsel Act, CAL. GOV'T. CODE § 68651(b)(7) (West 2012) (identifying factors such as case complexity, the adversarial nature of the case, and literacy issues, among others, as criteria to be considered when determining the litigant's need for representation).

[89] *Id.*; *see also* Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES, October

unbiased judiciary to apply them, true equality before the law will be thwarted if people cannot invoke the laws for their protection."[90] It recognizes that this imbalance fuels the corrosive perception that the judicial process is unfair and only available to those who can afford it.[91]

The Legislature suggested that access to representation is not simply a moral imperative but saves the state money and improves court efficiency.[92] According to the statute, "[t]he fair resolution of conflicts through the legal system offers financial and economic benefits by reducing the need for many state services and allowing people to help themselves."[93] The Legislature further notes that "[e]xpanding representation will not only improve access to the courts and the quality of justice obtained . . . but will allow court calendars that currently include many self-represented litigants to be handled more effectively and efficiently."[94] The legislation provided funding for appointment of counsel to indigent, pro se litigants and directed the California Judicial Council to develop pilot projects providing counsel in child custody, housing, probate, guardianship, and domestic violence cases in selected courts.[95] These programs are currently underway, and evaluations of the projects will be available in 2016.[96]

In Massachusetts, the Boston Bar Association recommended that state courts, in collaboration with legal services providers, initiate nine pilot projects providing counsel in housing, family, immigration and juvenile law matters.[97] The Boston Bar Foundation and the Boston Foundation then funded two Eviction Pilot Projects: one at the Quincy District Court staffed by attorneys from Greater Boston Legal Services, and the second at the Northeast Housing Court Division staffed by

---

17, 2009, http://articles.latimes.com/2009/oct/17/local/me-civil-gideon17, <http://perma.cc/YL9Y-Z4CG> (characterizing the pilot project embodied in the California legislation as "an unprecedented civil court experiment to pay for attorneys to represent poor litigants.").

[90] Act effective 2009, ch. 457, § 1(f), 2009 Cal. Legis. Serv. (West 2009) (codified at CAL. GOV'T. CODE § 68651).

[91] *See id.* (stating that "[f]or persons without access, our system provides no justice at all, a situation that may be far worse than one in which the laws expressly favor some and disfavor others.").

[92] *Id.* § 1(k).

[93] *Id.* § 1(d).

[94] *Id.* § 1(e).

[95] *Closing the Loop – Sargent Shriver Civil Counsel Act*, 2011 ONLINE EDITION OF INNOVATIONS IN THE CALIFORNIA COURTS, http://www.courts.ca.gov/15583.htm, <http://perma.cc/XY65-F2UE>; JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) (FEUER) 2 (2012), *available at* http://www.courts.ca.gov/documents/AB-590.pdf, <http://perma.cc/549N-W9G3>. *See also* CAL. GOV'T. CODE § 68651(b)(1) (West 2012) (authorizing the use of grant funding to create projects that provide representation for low-income persons who require legal services in civil matters).

[96] CAL. GOV'T. CODE § 68651(c) (West 2012).

[97] BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 2 (2008), *available at* http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf, <http://perma.cc/4ZHM-P68P>.

attorneys from Neighborhood Legal Services.[98] Both projects confirmed that limited and full representation improved litigants' ability to stave off eviction, though the Quincy project study demonstrated that such representation did not necessarily avoid eviction in the long term or garner financial benefits for tenants such as damages.[99]

Pennsylvania has undertaken similar initiatives.[100] The Philadelphia Bar Association has focused on cases in which individuals are under threat of losing custody or shelter.[101] The Civil Gideon Task Force of the Philadelphia Bar recommended that the Bar support demonstration projects to be developed in housing and custody courts.[102] In January 2012, the Task Force, through its Housing Working Group and in collaboration with the local courts, initiated the Philadelphia Landlord/Tenant Legal Help Center offering information, advice, and limited representation to tenants.[103] Meanwhile, the Texas Access to Justice Foundation announced special impact initiative grants in 2009 to fund pilot projects in two categories: "Expanding the Right to Civil Counsel 'Civil Gideon' Pilot Projects," and "Self-Represented Litigation Pilot Projects."[104]

While these state and local initiatives have moved a few jurisdictions closer to making civil *Gideon* a reality, they are still the exception. Indeed, as a 2011 report on civil justice infrastructure across the United States noted, "[s]tates differ substantially in the resources available to support civil legal assistance, in the kinds of services that are available, and in the groups served by existing programs. Little coordination exists for civil legal assistance."[105] The report notes that most services

---

[98] BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION: A REPORT ON THE BBA CIVIL RIGHT TO COUNSEL HOUSING PILOTS i–ii (2012), *available at* http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf, <http://perma.cc/UX59-FBEK?type=live>.

[99] *See id.* at 2–3 (describing success of the pilot programs).

[100] *See generally* PHILADELPHIA BAR ASSOCIATION CHANCELLOR'S TASK FORCE ON CIVIL GIDEON, 2012 REPORT TO THE BOARD OF GOVERNORS (2012) *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/2012CivilGideonTaskForceReportBoardGov.pdf, <http://perma.cc/JXJ7-XUWT>.

[101] *Id.* at 2.

[102] *Id.* at 4.

[103] *Id.* at 5. *See also Landlord/Tenant Legal Help Center Opens Jan. 30,* PHILADELPHIA BAR ASSOCIATION NEWS, Jan. 23, 2013, http://www.philadelphiabar.org/page/NewsItem?newsItemID=1001180, <http://perma.cc/74FV-SY5P> (describing the scope of the Landlord/Tenant Legal Help Center).

[104] Press Release, Texas Access to Justice Commission, Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System (Sep. 15, 2009), *available at* http://www.texasatj.org/node/347, <http://perma.cc/R3AS-HR52>.

[105] REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT v (2011) *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf, <http://perma.cc/GF2H-A5RF>.

provided to pro se litigants are the result of small, public or private projects that are initiated locally and funded through small grants or donations.[106] This patchwork of services has resulted in a civil justice infrastructure whose "diversity and fragmentation . . . combine to create [a system] characterized by large inequalities both between states and within them."[107]

IV. REALIZING THE PROMISE OF THE *TURNER* MANDATE: THE D.C. CHILD SUPPORT COMMUNITY LEGAL SERVICES PROJECT

Scholars have proposed strategies for bolstering access to justice in civil courts that go beyond the *Turner* Court's recognition of the need for alternative procedural safeguards.[108] Russell Engler, for example, has suggested a three-pronged approach:

> (1) [E]xpanding the roles of the key players in the court system to promote meaningful access, (2) utilizing an array of assistance programs short of full representation by counsel, paired with rigorous evaluation of the programs to identify the scenarios in which they can sufficiently protect the interests at stake, and (3) an expansion of a civil right to counsel where the lesser steps cannot afford meaningful access.[109]

Implementing this approach is challenging; however, initiatives have developed across the country that utilize many of the strategies that Engler suggests.

Courts, bar associations and non-profits have developed limited legal assistance programs to support pro se litigants.[110] These programs offer a range of services including self-guided online information or hotlines, online document-production services, interview and advice-only services, preparing or reviewing documents, coaching litigants through the litigation process without entering an appearance, and limited or

---

[106] *Id.*

[107] *Id.* at 9.

[108] *See generally* Engler, *supra* note 24, at 32; Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006); Abel, *supra* note 70.

[109] Engler, *supra* note 24, at 32. *See also* Engler, *supra* note 108 (framing a three-pronged strategy for achieving a civil right to counsel).

[110] *ABA Affordable Legal Services: Innovative Programs to Help People of Modest Means Obtain Legal Help*, AMERICAN BAR ASSOCIATION (July 11, 2014), http://www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income.html, <http://perma.cc/H38G-A5PA>.

same-day representation.[111]

One such project, the Child Support Community Legal Services Project in Washington D.C., offers a range of services, including the possibility of same-day representation, to unrepresented litigants.[112] This project provides true "alternative procedural safeguards" and demonstrates the labor-intensive, rigorous process needed to go further in order to achieve the three-pronged approach that Engler suggests. Through the project, the roles of local legal services providers, university-based legal clinics, the D.C. Bar Association, law firms, and the local courts have expanded "to promote meaningful access" to the paternity and child support courts.[113]

A. Paternity and Child Support Adjudication in Washington, D.C.

The District of Columbia uses a judicial model for adjudicating paternity and child support cases.[114] Child support orders are established, modified, and enforced through evidentiary hearings in D.C. Superior Court.[115] The majority of cases are initiated by the District of Columbia Child Support Services Division ("CSSD").[116] Custodial parents who receive TANF must assign their right to collect child support to the state as a condition of receiving cash assistance from the government.[117] In addition, for a nominal fee, CSSD will initiate or enforce a child support case on behalf of any custodial parent seeking support for children.[118] In all of these cases, CSSD is represented in court by attorneys from the

---

[111] *Id.*

[112] Tianna Terry, *Child Support Community Legal Services Project Expands Coverage, Receives Additional Assistance*, MAKING JUSTICE REAL (Dec. 2, 2011), http://www.makingjusticereal.org/child-support-community-legal-services-project-expands-coverage-receives-additional-assistance, <http://perma.cc/K7NK-UL5X>.

[113] Engler, *supra* note 24, at 32.

[114] *See Child Support Process: Administrative v. Judicial*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 2013), http://www.ncsl.org/research/human-services/child-support-process-administrative-vs-judicial.aspx, <http://perma.cc/A65L-DEMX> (comparing administrative processes with judicial processes and listing each state's preference). In many states an administrative process is used in which state agencies establish and modify child support orders with appeals of these agency decisions directed to administrative courts. *Id.*

[115] *Paternity and Child Support Branch*, DISTRICT OF COLUMBIA COURTS, http://www.dccourts.gov/internet/superior/org_family/patchild.jsf, <http://perma.cc/G9CJ-XJLF>.

[116] *About CSSD*, CHILD SUPPORT SERVICES DIVISION, http://cssd.dc.gov/page/about-cssd, <http://perma.cc/F7LJ-NAE8>.

[117] *Temporary Assistance for Needy Families*, CHILD SUPPORT SERVICES DIVISION, http://cssd.dc.gov/page/temporary-assistance-needy-families, <http://perma.cc/JB8K-7862>.

[118] *Opening a Child Support Case*, CHILD SUPPORT SERVICES DIVISION, http://cssd.dc.gov/service/opening-child-support-case, <http://perma.cc/3XY9-D4P7>.

D.C. Office of the Attorney General ("OAG").[119] These attorneys represent the interest of the District in obtaining reimbursement for public assistance and, more generally, in obtaining financial and medical support for children. They do not represent either parent in paternity and support proceedings.[120] The vast majority of respondents do not have lawyers and appear pro se.[121]

Experienced OAG attorneys participate in a broad range of cases including paternity and child support establishment, modification, and civil contempt. The OAG attorneys and paralegals are assigned to each of the paternity and child support courtrooms. They interview the noncustodial parent in every case initiated by CSSD, gathering information about the pro se defendant's income and work history. In many cases, these meetings take place inside the courtroom before the judge has taken the bench. The OAG staff usually attempt to reach a consent agreement with the defendant regarding paternity or support payments.[122] If the defendant is willing to consent to the proposed terms, the OAG attorney drafts the agreement and has the defendant sign it. The case is then heard at the beginning of the calendar call and the defendant is able to leave earlier than those parties with contested matters.[123]

In cases in which no consent agreement is reached between the defendant and the OAG, pro se defendants appear before one of three magistrate judges to contest their cases.[124] The OAG attorneys present the state's position and, in many cases, the custodial parent is not present and does not provide testimony or documentary evidence. Given the high volume of cases on the paternity, support, and contempt calendars, cases move quickly, and defendants often do not make—and thereby waive—objections to jurisdiction and service of process. Pro se litigants in establishment and modification cases are generally not aware of their rights to request documentation of the other parent's income, nor do they pursue their rights to additional discovery. Litigants in contested matters (including civil contempt) largely stumble through evidentiary hearings, while experienced government attorneys efficiently present the state's

---

[119] *See Child Support Services Division*, OFFICE OF THE ATTORNEY GENERAL, http://oag.dc.gov/page/child-support-services-div, <http://perma.cc/AH6Y-J9DU?type=live> (detailing the functions of the Child Support Services Division within the D.C. Office of the Attorney General).

[120] Bulle-Vu, *supra* note 22; *Temporary Assistance for Needy Families*, *supra* note 117.

[121] Bulle-Vu, *supra* note 22.

[122] SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY COURT, HANDBOOK FOR PEOPLE WHO REPRESENT THEMSELVES IN DIVORCE, CUSTODY AND CHILD SUPPORT CASES 15 (2014) *available at* http://www.dccourts.gov/internet/documents/DR-Handbook-for-Self-Represented-Parties.pdf.

[123] *Id.*

[124] One day per week each of the three judges hears civil contempt cases in a separate courtroom. The three paternity and child support courtrooms do not have lock-up facilities, so a different courtroom must be used to accommodate defendants who are found in contempt and held for incarceration processing. The OAG initiates most of the civil contempt actions.

case.

Most judges take a relatively active role in assisting pro se litigants through the hearing process.[125] The D.C. Superior Court has revised its judicial canon of ethics to permit judges to ensure that pro se litigants understand the adjudication process.[126] The rules permit trial and appellate court judges to provide "reasonable accommodations" to pro se litigants, including asking neutral questions designed to clarify issues, explaining rights and court procedures, altering the ordering of introduction of evidence, and making referrals to other resources.[127]

Despite judicial intervention on behalf of pro se litigants, a significant power imbalance exists in the adjudication of paternity and child support matters. Experienced OAG attorneys represent the government in almost every case, while pro se respondents remain unaware of their rights, unfamiliar with defenses, and without a full understanding of the negotiation and adjudicatory processes.[128] Two community-based legal services providers, the D.C. Legal Aid Society and Bread for the City, developed the Child Support Community Legal Services Project to ameliorate this imbalance and enhance due process in paternity and child support cases.[129]

B. Goals and Structure of CSCLSP

CSCLSP attorneys and paralegals provide information, legal counseling, assistance with negotiation, limited representation, and in some cases, full representation, to pro se litigants in the Paternity and

---

[125] *See* Zoe Tillman, *D.C. Courts System Adopts New Code of Judicial Conduct*, The BLT: THE BLOG OF LEGAL TIMES (Jan. 23, 2012, 1:58 PM), http://legaltimes.typepad.com/blt/2012/01/dc-courts-system-adopts-new-code-of-judicial-conduct.html, <http://perma.cc/D2L6-UM4B> (describing new judicial code in D.C. which encourages judges to take an "affirmative role" in assisting pro se litigants).

[126] *Id.*

[127] *See* D.C. CODE JUD. CONDUCT R. 2.6, cmt. 1A (2012) ("The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. . . . [J]udges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.").

[128] *See* Bulle-Vu, *supra* note 22 (stressing that while the "OAG sets the calendar, negotiates consent agreements, and litigates disputed cases, sometimes without the custodial parent's participation . . . . non-custodial parents [who are unaware of their rights] often give up without a fight and consent to orders that do not reflect all the facts or which they cannot afford to pay. Those that do demand a hearing struggle to present necessary facts or make legal arguments. . . . [This forces] magistrate judges . . . to make sense of the imbalanced, often imperfect information presented as evidence in their attempt to impose fair support orders.").

[129] *Id.*; *Special Projects*, *supra* note 20.

Child Support Branch of the D.C. Superior Court.[130] The CSCLSP staff offers services five mornings per week, and project attorneys are experts in the laws and procedures governing paternity and child support in the District.

The court has authorized CSCLSP to occupy a small witness room outside one of the child support courtrooms from which paralegals (volunteers from local law firms) screen potential clients for eligibility. Once they determine that a litigant is eligible for services, project attorneys leave the screening area and try to find an empty witness room in another courtroom to meet or, if there are no rooms available, they meet in the hallway outside of the child support courtrooms. The attorneys gather information from the litigant about the status and complexity of the case in order to determine the type of service needed.[131] Project attorneys are available to assist custodial parents as well as non-custodial parents who have paternity and child support matters scheduled.[132]

CSCLSP attorneys serve only D.C. residents due to restrictions imposed by the nature of the project's funding. However, many of the litigants in D.C. paternity and child support cases are residents of Maryland or Virginia.[133] In order to serve as many individuals as possible, the CSCLSP partners with the General Practice Clinic at The Catholic University of America and the D.C. Bar Pro Bono Program.[134] Law students and pro bono attorneys from these organizations staff the center and serve residents from outside the District.

CSCLSP aims to achieve several goals. The primary goal is to "break the cycle of inertia" that existed in child support adjudication before the project's inception, and to remedy the representation imbalance occurring in child support proceedings due to the presence of government attorneys in nearly all cases.[135] Attorneys working for the project aim to interrupt the way child support adjudication traditionally functioned in D.C. courts, and ensure that litigants understand their rights and potential defenses.[136]

CSCLSP attorneys have begun to question and alter pre-hearing and hearing practices that had become routine in the paternity and

---

[130] *Legal Assistance*, *supra* note 23.

[131] Interview with Tianna Gibbs, Attorney, and Ashley McDowell, Attorney, Legal Aid, in Wash. D.C. (Oct. 10, 2013).

[132] Terry, *supra* note 112.

[133] Interview with Su Sie Ju, Attorney, Bread for the City, in Wash. D.C. (Oct. 7, 2013).

[134] *Community Outreach & Advocacy Projects*, THE CATHOLIC UNIVERSITY OF AMERICA (Feb. 15, 2013), http://clinics.law.edu/Community.cfm, <http://perma.cc/K69F-5VW5>.

[135] Interview with Stephanie Troyer, Attorney, and Meridel Bulle-Vu, Attorney, CSCLSP, in Wash. D.C. (Oct. 16, 2013).

[136] *Id.*

support courtrooms. They provide pro se litigants—both custodial and non-custodial parents—with information about their rights. Specifically, they explain the role of the Assistant Attorneys General and clarify that OAG attorneys are not judges but instead represent the interests of the state. They inform parties of the purpose of the pre-hearing meetings with OAG, and also advise litigants that they are entitled to receive information about the other parent's financial circumstances and are not required to sign a consent agreement. They gather information about the litigant's case and provide case-specific advice on a range of procedural and substantive issues. With these changes, CSCLSP has begun to shift the balance of power that OAG had long held in the adjudicative process.

The CSCLSP also offers services that require more intervention on behalf of a client.[137] Project attorneys negotiate on behalf of pro se litigants in the pre-hearing meetings with OAG.[138] This type of intervention enables the attorneys to clarify miscommunications that may have arisen between the government attorney and the litigant, and draft agreements that are more protective of the litigant's due process and substantive legal rights. In addition, the project attorneys enter a limited appearance to provide same-day representation in cases which are procedurally complex, raise questions of capacity, or in which the stakes are significant.[139]

Although providing limited information, advice, negotiation, or same-day representation is often sufficient to enable pro se litigants to secure appropriate relief, there are cases in which only long-term representation will enable a full and fair hearing of disputed issues.[140] Over time project attorneys have learned that there are certain cases that require full representation regardless of the capacity of the litigant.[141] These are cases in which the stakes or the rights at issue are weighty, and failure to present the argument satisfactorily could lead to significant and negative long-term consequences for the unrepresented litigant.[142] Examples of these types of high stakes cases include: claims to

---

[137] PATERNITY AND CHILD SUPPORT BRANCH, EARLY REPORT ON THE DEVELOPMENT PHASE OF THE PROBLEM SOLVING COURT 5–6; interview with Su Sie Ju, *supra* note 133.

[138] Interview with Su Sie Ju, *supra* note 133.

[139] *Id.*

[140] Interview with Vanessa Batters-Thompson, Attorney, Bread for the City, in Wash. D.C. (Oct. 4, 2013).

[141] *Id.* According to Batters-Thompson, project attorneys look at a number of criteria in determining what level of services a litigant may require, including the complexity of the legal issue, whether there is an opposing attorney in the case, and the capacity of the litigant.

[142] *But see* Jack Londen, *A Right to Counsel in Which Civil Cases?*, CONCURRING OPINIONS (June 27, 2011), http://www.concurringopinions.com/archives/2011/06/a-right-to-counsel-in-which-civil-cases.html, <http://perma.cc/RAK8-HQ7W> ("*Turner v. Rogers* rejected the stakes of the interest involved as the sole selection criterion for invoking a due process right to counsel. All nine Justices agreed that even though the human interest in personal liberty was at stake, it was overridden by other considerations.").

disestablish paternity or set aside a paternity judgment, arguments for reducing sizeable arrearages based on statute of limitations or other defenses, petitions to impute income, cases involving non-traditional employment or self-employment which would benefit from comprehensive discovery, and allegations of civil contempt in which the consequence of failing to adequately present a case include incarceration.[143]

On the other hand, there are certain issues that routinely arise in paternity and child support cases that a litigant with the capacity to articulate a position can successfully resolve with limited advice and guidance.[144] For example, if neither parent has ever resided in D.C., and the respondent has proof of residency in another state, he can (with explanation and guidance from a project attorney) request that the case be dismissed. Similarly, if paternity has been established and the parties are scheduled for a hearing to set a child support order, a CSCLSP attorney or volunteer can review any documentation of income the client has brought, inform him of his rights to obtain information about the other parent's income, calculate the likely temporary guideline amount, and advise him not to agree to a permanent support order until there is information available about the other parent's income. Armed with this information, most pro se litigants can successfully proceed without representation.[145] Even in contempt cases, a lawyer may not be necessary for the first court appearance; most pro se litigants armed with limited advice to seek a continuance (to obtain counsel or gather additional evidence) can request—and are likely to receive—such continuance.[146]

The CSCLSP offers a panoply of "alternate procedural safeguards," whose adequacies are determined by considering the capacity of the litigant, the complexity of the legal issue, the stakes involved, and the role of the government.[147] Regardless of the level of service provided, the project attorneys are keenly aware that they must implement ethical

---

[143] Interview with Vanessa Batters-Thompson, *supra* note 140.

[144] *Id.* However, project attorneys noted that there are situations in which the litigant has mental health or cognitive issues that impair his capacity to represent himself, even if the legal issues are relatively straightforward. In these circumstances, project attorneys will attempt to provide representation and link the litigant with other social services. *Id.*

[145] These examples are based on experiences the author and her clinical students have had working with pro se litigants in the CSCLSP program.

[146] Interview with Vanessa Batters-Thompson, *supra* note 140. The initial stages of contempt hearings, however, still pose risks for self-represented litigants; if, for example, the self-represented respondent reveals information about his employment situation, he could be inadvertently admitting ability to pay, a critical element of a finding of contempt. *See also* Laura K. Abel, *Turner v. Rogers* and the Right of Meaningful Access to the Courts, 89 DENV. U. L. REV. 805, 805 (2012) (explaining the Court's decision in *Turner* that a litigant's meaningful access to the courts is not necessarily achieved through representation by counsel, but when the litigant is "able to identify the central issues in the case and present evidence and arguments regarding those issues.").

[147] Interview with Vanessa Batters-Thompson, *supra* note 140.

measures to assure competence, protect client confidentiality, define the scope of representation, avoid conflicts of interest, and ensure independence of professional judgment.[148]

C. Ethical Safeguards

The CSCLSP is structured to protect the interests of litigants who receive its services. Under the D.C. Rules of Professional Conduct, competent representation "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[149] A less experienced attorney may acquire competence through association with an attorney who has specialized knowledge or expertise in the field.[150] The CSCLSP project is supervised by an experienced managing attorney from each legal services agency.[151] Initially, the supervisors hired and trained the project attorneys, several of whom already had a background in paternity and child support law. The supervising attorneys spent significant time onsite at the outset of the project to observe and guide new attorneys. As each CSCLSP staff attorney has gained expertise in child support and paternity law, the supervising attorneys remain available for consultation as needed. Similarly, project partners include experienced family law attorneys who supervise the law students and pro bono attorneys who provide services.[152]

Substantive expertise is critical given that the CSCLSP project operates under significant time constraints. CSCLSP attorneys must gather information, identify critical legal issues, make judgments, and advise litigants in a time frame of approximately fifteen to twenty minutes. The ability to communicate effectively with litigants and explain complex concepts clearly requires facility with the law and significant client interviewing and counseling skills.[153] In addition,

---

[148] Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131; interview with Vanessa Batters-Thompson, *supra* note 140.

[149] D.C. RULES OF PROF'L CONDUCT R. 1.1(A) (2007).

[150] *Id.*

[151] *See, e.g.*, *All in the Family Court*, BREAD FOR THE CITY, http://www.breadforthecity.org/tag/child-support/, <http://perma.cc/MVE4-Z5UZ> (highlighting the work of a full-time staff attorney at the D.C.-based nonprofit assigned to child-support court).

[152] Under the supervision of the author, law students from The General Practice Clinic of The Catholic University of America, Columbus School of Law, interview and counsel pro se litigants seeking assistance from the CSCLSP. See also Terry, *supra* note 112.

[153] D.C. RULES OF PROF'L CONDUCT R. 1.4 (2007). The capacity of the program to serve litigants who do not speak English is limited—while there is one attorney who speaks Spanish, and project attorneys have access to a language line which can be utilized to conduct interviews, the physical space constraints of the project make utilization of such services challenging. Interview with

project attorneys who enter a limited court appearance and undertake same-day representation must review court files, amass any evidence available, present arguments to the court, and, in some cases, conduct evidentiary hearings. This requires thorough familiarity with the law as well as oral advocacy skills.

In order to protect confidentiality, CSCLSP staff screen all cases and conduct all further communications in a private witness room. The CSCLSP attorneys and partners explain at the outset of the interaction that all communications are confidential. This builds trust and facilitates communication.

CSCLSP attorneys routinely consider the scope of their representation and memorialize the parameters of the services they are agreeing to provide.[154] At the outset of the interaction, attorneys explain that services will only be provided for that day. If the attorney offers limited advice, then the attorney gives the litigant a written document at the end of the interview that reiterates the limited scope of the services provided.[155] If the project attorneys agree to negotiate with government attorneys, or provide same-day representation in a hearing, then the litigant must sign a limited retainer.[156]

The most complicated ethical issue that CSCLSP attorneys face is conflicts of interest. While the D.C. ethical rules on limited assistance have relaxed the conflicts prohibitions to enable pro bono attorneys to provide short-term, limited advice,[157] conflicts issues remain. The two legal services agencies operating the CSCLSP have developed slightly different conflicts procedures. One agency checks conflicts at the court-annexed screening office, before meeting with any individual seeking legal assistance, utilizing a web-based client database.[158] The other agency screens only for known conflicts in cases in which agency attorneys are providing information and limited advice. If the attorneys determine, however, that same-day representation is warranted, they contact their agency to check for conflicts before undertaking the representation.[159] Both agencies enter the names of all individuals who

---

Vanessa Batters-Thompson, *supra* note 140.

[154] Interview with Vanessa Batters-Thompson, *supra* note 140.

[155] *Id.* Project partners such as the General Practice Clinic at Catholic University use their own form, which explains the scope of the representation as well as the role of law students and attorney supervisors.

[156] *Id.*

[157] *See* D.C. RULES OF PROF'L CONDUCT R. 6.5 (2007) (stating that lawyers who "provide[] short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation" are subject to conflict of interest rules "only if the lawyer *knows* that the representation of the client involves a conflict of interest.") (emphasis added).

[158] E-mail from Su Sie Ju, Attorney, Bread for the City, in Wash. D.C. (Mar. 26, 2015) (on file with author).

[159] Interview with Su Sie Ju, *supra* note 133.

receive limited advice on any given day into their respective databases.[160] Whether or not this is required under the D.C. rules regarding limited-assistance, the supervising attorneys believe that such measures are necessary to preserve the perception of competence and fairness.[161]

Finally, the attorneys must preserve their independence of professional judgment.[162] The CSCLSP attorneys recognize that the same institutional forces and imbalance of power that propelled the creation of CSCLSP could potentially lead to a weakening of their independence of judgment. Government attorneys who initially resisted the project now refer pro se litigants to the CSCLSP attorneys in hopes that project attorneys will explain the law to defendants and assist in resolving cases.[163] Government attorneys and project attorneys have developed relatively cordial relationships and the pressure to maintain this status quo builds over time.[164] Similarly, judges have come to rely on the project, referring litigants with thorny legal issues or seemingly obstinate personalities to the CSCLSP.[165] These judges can become concerned when the project attorneys are unable to assist a litigant, and sometimes inquire as to why attorneys are unable to accept a case. Answering these inquiries could cause project attorneys to reveal confidential information, yet they are under pressure to do so. The CSCLSP attorneys remain vigilant to vigorously challenge the government's position in pre-hearing negotiations, assert complex, often time-consuming procedural and substantive issues orally or in writing, and protect confidential information regarding eligibility decisions from inquiring judicial officers.[166]

D. Successes and Challenges of the CSCLSP Model

CSCLSP demonstrates that different tools are needed to address the variable tasks that pro se litigants face in paternity and child support cases. The variety of approaches needed reflects the complexity of the

---

[160] Interview with Vanessa Batters-Thompson, *supra* note 140. The screener tracks the number of cases screened each day and sends aggregate figures to both agencies. The screener does not provide identifying information on particular cases. Each agency utilizes slightly different procedures to track particular matters.

[161] Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131; interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[162] Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[163] Interview with Su Sie Ju, *supra* note 133.

[164] *Id.*

[165] *Id.*; interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[166] Interview with Vanessa Batters-Thompson, *supra* note 140.

tasks required, the fundamental nature of the interests at stake, and the capacity of individual litigants. As Engler points out, this is not a matter of drawing artificial lines but of making careful decisions about what type of resource and approach is needed to address specific litigation situations.[167]

CSCLSP has markedly altered the balance of power in the D.C. paternity and child support courts, and has engendered a perception among litigants who use CSCLSP services that the adjudication process is generally a fair one.[168] On a daily basis, CSCLSP attorneys are assisting pro se litigants to raise procedural defenses such as lack of jurisdiction and improper service—defenses that were frequently waived or overlooked prior to CSCLSP involvement. Pro se custodial parents who seek assistance from CSCLSP receive clarification about the role of the OAG attorneys. Specifically, CSCLSP attorneys disabuse custodial parents of the notion that the OAG attorneys represent them, and instead encourage these parents to advocate more vigorously for themselves, particularly when the government has failed to undertake sufficient discovery to determine the financial resources available to the noncustodial obligor.[169] CSCLSP attorneys negotiate on behalf of pro se defendants and secure consent agreements that take full account of the various deductions and adjustments available under the D.C. Child Support Guideline.[170]

When CSCLSP attorneys enter a same-day appearance in a contested case, they are able to assert claims and defenses, object to evidence, cross-examine witnesses, introduce documentary evidence, and elicit testimony to ensure a full and fair hearing of complex paternity and child support issues. This not only leads to improved hearings but also creates a clearer and more comprehensive record for appeal. Finally, in those cases in which CSCLSP attorneys determine that full representation is warranted, agency lawyers routinely file motions supported by comprehensive briefs. This full airing of procedural and substantive issues has improved the quality of practice and adjudication in these courts.

---

[167] Engler, *supra* note 24, at 52 ("The proper response to scarcity is not to draw artificial lines based on . . . a presumption that a criminal case is always more important than a custody or eviction case, but to have an explicit conversation as to which types of issues or interests are most important and why, paired with careful analysis of what levels of intervention are necessary to protect those interests. Both pro se reform and an expanded right to counsel are needed, rather than one or the other.").

[168] Interview with Diane Brenneman, Magistrate Judge, D.C. Superior Court, in Wash. D.C. (Oct. 22, 2013).

[169] CSCLSP and volunteer attorneys often encourage pro se custodial parents to request subpoenas or send employer's statements to the defendant's employer to gather more detailed information about their income and financial resources. The author's students frequently accompany parents to the proper court offices to obtain these documents and explain how they must be served.

[170] *See generally* D.C. CODE § 16-916.01 (2008).

The presence of CSCLSP attorneys, even if only for one day, allows judges in paternity and child support cases to focus on listening to the evidence, rather than having to interrupt the flow of testimony to explain concepts and arguments to pro se litigants.[171] CSCLSP attorneys also eliminate the need for judges to ask questions of pro se litigants that could potentially be prejudicial.[172] Even in cases in which CSCLSP attorneys do not enter a same-day appearance, the presence of project attorneys in other hearings has educated the court about defenses or affirmative arguments that defendants should routinely raise in cases involving complex issues such as disestablishment of paternity.[173] This has spurred judges, consistent with the judicial ethics rules,[174] to raise these issues when a pro se litigant does not have the capacity or knowledge to do so.[175]

One important component contributing to the success of the CSCLSP project is the level of expertise of the attorneys and the quality of supervision that these attorneys receive. Staff attorneys and supervising attorneys have expertise in the areas of paternity, child support, and related areas of domestic relations law.

Contrary to the *Turner* Court's suggestion that appointment of counsel could impose unfairness into the process leading to less child support for children, the experience in the Child Support Community Project demonstrates that involvement of attorneys on behalf of pro se, non-custodial parents (NCPs) might actually assist in providing more support to families. Attorneys help NCPs understand their child support obligations and ensure that fair and reliable orders are entered.[176] For example, attorneys in limited assistance or same-day representation programs can: 1) explain how the child support guideline calculation works, 2) encourage the defendant to find employment, 3) urge the defendant to voluntarily make payments if engaged in underground employment, 4) assist in needed discovery to gather information regarding income of opposing party, 5) monitor compliance with conditions set in contempt proceedings, 6) facilitate payment of purge amounts in contempt cases, 7) explain consequences of acknowledging paternity, and 8) assist in accessing visitation rights.

While the CSCLSP is successfully shifting the balance of power and the perception of unfairness which have pervaded the paternity

---

[171] Interview with Diane Brenneman, *supra* note 168.

[172] *Id.*

[173] Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131.

[174] *See* D.C. CODE JUD. CONDUCT R. 2.6, cmt. 1A (2012) (noting that a judge may "provide[] brief information about the proceeding and evidentiary and foundational requirements" in facilitating a pro se litigant's right to be heard).

[175] Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[176] Terry, *supra* note 112.

establishment and child support process, challenges remain. The demand for CSCLSP services has been lower than expected.[177] Announcements about the availability of attorneys are made to litigants several times throughout the morning, yet only a fraction of litigants avail themselves of the project's services.[178] The demand accelerates once those waiting for their proceedings observe other litigants receiving help from CSCLSP attorneys or when OAG attorneys and judges refer litigants to the CSCLSP. Even so, demand remains lower than expected.[179] The attorneys attribute this, in part, to the physical surroundings in which CSCLSP offers its services.[180] While the project is located near the paternity and support courtrooms, CSCLSP lacks an official-looking office with private meeting space.[181] There is also no mechanism for informing litigants, in advance, that limited-assistance services will be available.[182]

Attorneys have also encountered litigants who believe that they can successfully handle their own cases without the assistance of an attorney. Many litigants are frustrated by the long waits they experience in court and fear that meeting with project attorneys will further delay an already protracted process.[183] There is also a delay in identifying contested or complex cases in which a litigant would greatly benefit from legal counsel. By the time judges hear the case and identify that same-day representation is needed, CSCLSP attorneys have often left for the day or do not have adequate time to prepare for representation.[184] Finally, there remains a certain apathy among pro se litigants, given the longstanding perception that the court process is stacked against NCPs in paternity and child support court.[185] The culture of apathy and perception of futility in the child support process will take time to dissipate.

The project also faces funding restrictions, which limit the eligibility criteria for participation in the program and make long-term planning and expansion of the project precarious. While the court has provided a witness room for CSCLSP use, space is at a premium in the courthouse, and there is no guarantee that this arrangement will be a long-term one. An additional challenge CSCLSP confronts is program evaluation. While the project managers recognize the importance of

---

[177] Interview with Diane Brenneman, *supra* note 168.

[178] *Id.*

[179] *Id.*; interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[180] Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[181] The CSCLSP screening room is on a different floor than the courtroom used for civil contempt hearings, which also makes it more difficult for litigants in contempt matters to seek assistance.

[182] Interview with Diane Brenneman, *supra* note 168.

[183] Interview with Su Sie Ju, *supra* note 133.

[184] Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[185] Interview with Tianna Gibbs and Ashley McDowell, *supra* note 131.

undertaking empirical evaluation to ensure that the services it provides are reaching the intended audience and meeting the objectives of the program, such evaluations are labor intensive and expensive. Both agencies are exploring collaborations with local universities to undertake further evaluation.[186]

V. GUIDELINES AND RECOMMENDATIONS: APPLYING LESSONS LEARNED FROM CSCLSP

Limited legal advice and other pro bono programs geared to assisting pro se litigants are burgeoning around the country.[187] As Engler points out, whether to implement pro se assistance projects or institute the right to counsel in civil cases is not an either-or proposition. Appointment of an attorney is just one component needed to enhance access to justice.[188] The CSCLSP project illustrates that calibration is possible and offers courts and legal service providers a model for implementing meaningful "alternative procedural safeguards" for pro se litigants.

A. Develop Procedural Safeguards That Take Account of Complexity, Capacity, Stakes, and Balance of Power

The definition and examples of "adequate procedural safeguards" articulated in *Turner* fail to account for the complexity of legal issues pro se litigants face, as well as the capacity of the litigants to utilize resources. Access to justice projects that provide progressive levels of service based on the complexity of the legal issues, the stakes involved

---

[186] Legal Aid Society of D.C. and Bread for the City are exploring the possibility of such an evaluation with the National Catholic School of Social Work at Catholic University.

[187] *See* AMERICAN BAR ASSOCIATION, *supra* note 110 (describing limited legal and pro se assistance programs across the country); *see also* SELF-REPRESENTED LITIGATION NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES (2008 ed.) *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/best_practices_7_08.authcheckdam.pdf, <http://perma.cc/357S-EYSR> (describing access to justice programs and effective court operations that facilitate services for pro se litigants).

[188] Engler, *supra* note 24, at 53 ("[R]epresentation is only one variable impacting case outcomes. The substantive law, the procedural law, the judge or decision maker, and the operation of the courts are other factors. Second, power matters greatly in interpreting the dynamics of cases. Identifying power imbalances and the sources of power are important steps in analyzing where full representation is more likely to be needed and where lesser forms of assistance might suffice. Finally, where representation is needed, a representative with specialized expertise in the area of law and the forum is likely to be needed, as opposed to merely any representative").

for the litigant, the capacity of litigants to advocate for themselves, and the need to preserve balance of power, offer a true alternative to full-fledged civil *Gideon*.

The CSCLSP project highlights what the prior decisions in *Turner* and *Lassiter* failed to recognize: that deprivation of basic necessities and the financial means to garner such necessities may be equally significant—or of higher significance—than physical deprivation of liberty. *Turner*, like *Lassiter*, identifies potential deprivation of physical liberty as the ultimate trigger of due process protection.[189] The reality in the child support context, however, is that deprivation of the financial resources that pro se litigants need to subsist, or establishment of paternity, which obligates parents to pay child support for up to twenty-one years, involve stakes that are arguably equal to or greater than those at issue in civil contempt and many criminal cases.

As the demands on a court-annexed resource center increase, it becomes more critical to have clear guidelines as to what type of cases the project will handle, and what level of service is warranted in different circumstances. While it may be unrealistic and constraining to outline every type of situation that attorneys are likely to encounter, it is important to delineate criteria so that decisions about which matters to handle, how much time to spend on each matter, and whether to continue representation are not left solely to the discretion of individual attorneys. The ABA Handbook on Limited Scope Legal Assistance, for example, identifies the types of clients best suited for a limited-assistance model.[190] It suggests that individuals who have "a degree of emotional detachment, the willingness and ability to handle some 'legal paperwork,' some capacity to gather and analyze financial information, reasonable decisiveness, willingness and ability to handle details and follow through on obligations, and the necessary time to perform delegated tasks" are good candidates for limited-assistance services.[191] Establishing case-selection criteria leads to consistency in program services, enable staff to justify decisions to decline service, and ensure continuity when there is staff turnover.

The *Turner* opinion highlights balance of power as a critical factor in determining what level of process is due to unrepresented litigants.[192]

---

[189] *See* Turner v. Rogers, 131 S.Ct. 2507, 2517 (2011) (determining that a constitutional right to counsel exists only in cases involving incarceration).

[190] MODEST MEANS TASKFORCE, AMERICAN BAR ASSOCIATION, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 59–60 (2003) *available at* https://apps.americanbar.org/litigation/taskforces/modest/report.pdf, <http://perma.cc/8SCK-4C99>.

[191] *Id.* (citing M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES (1997)).

[192] *Id.* at 2519. The Court notes that its decision is based, in part, on the fact that the petitioner in *Turner*, like the respondent, was also unrepresented by counsel, and that affording an attorney to the defendant would have inappropriately tilted the balance of power in favor of the alleged contemnor. *Id.*

In situations such as child support adjudication, where government attorneys are routinely representing the interests of the state, the ability to have experienced, skilled attorneys available to assist pro se litigants tilts the power balance back toward equilibrium. Identifying cases or recurring scenarios in which the balance of power is skewed and, as a result, the litigant's substantive rights are likely to be infringed if they do not receive assistance, is critical to determining which cases will be eligible for services and what level of services they will receive.[193]

It is also critical to evaluate the methods used to implement the criteria to assess whether the project is achieving its goals. Nearly every state now offers pro bono limited advice services, yet there have been few empirical studies measuring the success of these programs.[194] Qualitative and quantitative evaluation can help courts and legal services providers to identify effective interventions as well as gaps in service. This information will enable providers to determine more precisely how to best deliver legal assistance in an environment of limited resources.[195] The ABA Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means [hereinafter "ABA Standards"], adopted in 2013, recommend that agencies identify objectives and periodically conduct evaluations to determine whether the agency's methods meet its stated objectives.[196] As Richard Zorza notes, "[i]f we identify 'safeguards' that work, and how best to use them, *Turner* may be seen as having prompted the research and analysis that assured 'fundamental fairness.'"[197]

B. Develop Ethical and Professional Safeguards To Protect Litigants and Foster a Perception of Fairness

Access to justice projects offering graduated services to pro se litigants must develop policies and practices to address 1) competence, 2) confidentiality, 2) competence, 3) scope of representation, 4) conflicts of

---

[193] Interview with Vanessa Batters-Thompson, *supra* note 140.

[194] *See* D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 905 (2013) (noting the limited number of studies conducted to evaluate limited legal assistance programs).

[195] *See* Abel, *supra* note 70, at 816–23 (discussing the need for sound empirical study).

[196] AM. BAR ASS'N STANDARDS FOR PROGRAMS PROVIDING CIV. PRO BONO LEGAL SERVS. TO PERSONS OF LIMITED MEANS §§ 2.17, 2.18, 3.6 (2013) [hereinafter ABA STANDARDS FOR PROGRAMS], *available at* http://www.americanbar.org/content/dam/aba/images/news/PDF/109.pdf.

[197] Richard Zorza, *A Final* Turner *Post from Your Co-hosts, Richard Zorza & David Udell*, CONCURRING OPINIONS (June 28, 2011), http://www.concurringopinions.com/archives/2011/06/a-final-post-from-your-co-hosts-richard-zorza-david-udell.html, <http://perma.cc/BSC8-DMWJ>.

interest, and 5) independence of professional judgment. While the ABA Model Rules and ethical rules in several states have relaxed some of the requirements imposed on lawyers engaging in limited representation of clients,[198] maintaining safeguards to protect the interests of clients is critically important to foster trust with litigants and uphold the integrity of the limited assistance process.

The American Bar Association recognizes limited assistance as a legitimate and ethical alternative to full-scale representation in Model Rule 1.2,[199] Model Rule 6.5[200] and in the ABA Standards.[201] Many states have adopted rules of professional conduct and issued ethics opinions which permit and offer guidance on limited representation.[202]

The quality of court-annexed limited assistance programs depends

---

[198] MODEL RULES OF PROF'L CONDUCT R. 6.5 (1983).

[199] MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983); *see also* MODEST MEANS TASKFORCE, *supra* note 190, at 84–89.

[200] MODEL RULES OF PROF'L CONDUCT R. 6.5 (1983). Model Rule 6.5 provides that:

> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
>
> > (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
> >
> > (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Id.

[201] ABA STANDARDS FOR PROGRAMS, *supra* note 196 ("[T]he American Bar Association recommends appropriate implementation of these Standards by entities providing civil pro bono legal services to persons of limited means."). These standards supplement the American Bar Association ("ABA") Standards for Provision of Civil Legal Aid, adopted in August 2006. AM. BAR ASS'N STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID (2006) [hereinafter ABA STANDARDS FOR CIVIL AID], *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_aba_civillegalaidstds2007.authcheckdam.pdf. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446, 4 (2007) (concluding that "there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants.").

[202] *See* Am. Bar Ass'n Standing Comm. on the Delivery of Legal Servs., *Pro Se Resources by State*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state.html (last visited Mar. 26, 2015) [hereinafter *Pro Se Resources by State*] (summarizing rules and ethics opinions throughout the country on limited assistance and unbundled legal services); *see also Unbundling Fact Sheet*, AMERICAN BAR ASSOCIATION (Jun. 2, 2011), http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/20110331_unbundling_fact_sheet.authcheckdam.pdf, <http://perma.cc/6CCJ-WEG6> (reporting that forty-one states have adopted the Model Rule or some form of it); *see also* MODEST MEANS TASKFORCE, *supra* note 190, at 84–89.

upon the competence of the personnel who staff them. The expedited nature of the services requires that those providing legal advice, negotiation assistance, and same day representation be thoroughly versed in the substantive law and procedure. CSCLSP illustrates the importance of having experts in the field supervising staff attorneys and pro bono volunteers. In addition, as the ABA Standards recognize, program personnel should be diverse and culturally competent in order to gain the trust of and serve effectively a diverse client base.[203]

Court-annexed resource centers and other limited assistance projects must ensure that confidentiality is preserved.[204] Principally, this means that there must be private space in which attorneys can conduct interviews and prepare for hearings. This can be difficult to accomplish in overcrowded and under-resourced courts. Limited-assistance projects that do not have a physical space in which lawyers can interview clients must maximize their ability to gather information and give advice in an environment that guarantees privacy and security of information.[205] In addition, even if the interaction will be limited to gathering information and offering limited advice based on that information, attorneys should explain that the communication is confidential.[206] The ABA Standards for the Provision of Civil Legal Aid recognize that a lawyer-client relationship is generally established through this type of individuated assistance.[207] An explanation of confidentiality enables the lawyer to gain the client's trust and facilitates communication with the litigant. Such express discussions of confidentiality (along with communications outlining the scope of representation) also help demonstrate that a lawyer/client relationship, albeit limited, has formed and therefore the attorney/client privilege attaches to communications.[208] This protects the litigant from having attorney's notes subject to discovery and prevents the attorney from being compelled to testify about the litigant's communications with the attorney.[209]

---

[203] ABA STANDARDS FOR PROGRAMS, *supra* note 196, §§ 2.1, 3.2.

[204] *Id.* § 3.4 ("Consistent with ethical and legal responsibilities, a pro bono program should preserve information regarding clients and prospective clients from any disclosure not authorized by the client or prospective client.").

[205] Interview with Stephanie Troyer and Meridel Bulle-Vu, *supra* note 135.

[206] The guarantee of confidentiality is particularly important in programs such as CSCLSP, where attorneys meet with the litigants for a substantial period of time and gain extensive knowledge about the individual's situation.

[207] ABA STANDARDS FOR CIVIL AID, *supra* note 201, § 3.5.

[208] *See e.g.* Feld v. Fireman's Fund Ins. Co., 292 F.R.D. 129, 137 (D.D.C. 2013) ("Under District of Columbia law, the attorney-client privilege applies only as follows: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.") (citing *Jones v. United States*, 828 A.2d 169, 175 (D.C. 2003)).

[209] *See* ABA STANDARDS FOR CIVIL AID, *supra* note 201, § 3.5; *see also* Jessica Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY

The ABA has also suggested, via a formal ethics opinion, that an attorney who provides legal assistance in the drafting of pleadings or other matters does not need to sign the documents or inform the court that the litigant has received assistance from an attorney. In Formal Opinion 07-446, the ABA Standing Committee on Ethics and Professional Responsibility permitted attorneys to prepare documents or pleadings for a client without disclosing the attorneys' assistance to courts or opposing parties.[210] The committee found that "the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation."[211] The committee concluded that litigants may receive limited assistance without revealing that they received this assistance, so long as there is no rule or statute requiring disclosure in the particular jurisdiction.[212] States differ as to whether "ghostwriting" of pleadings is acceptable.[213]

In order to avoid misunderstanding and prevent unrealistic expectations, court-annexed projects must make the scope of their representation clear to the pro se litigant, preferably in writing.[214] It may be, as it is in the CSCLSP model, that legal services providers and their law school or pro bono partners develop different forms to delineate attorney roles and obligations as well as client responsibilities.[215] As the ABA recognized in its extensive report on limited assistance practice, "[b]ecause the client-lawyer relationship is created by consent, "[t]he critical issue for the attorney in a limited scope representation is that the client fully understand and agree to what the attorney will do, and, more importantly, what the attorney will not do."[216]

Although some jurisdictions such as the District of Columbia permit a relaxing of conflicts rules in the context of limited assistance,[217] court-annexed limited-advice and same-day representation projects must

---

L. & POL'Y 453, 467 (2011).

[210] Formal Op. 07-446, *supra* note 201, at 2–3.

[211] *Id.* at 2.

[212] *Id.* (discussing undisclosed legal assistance to pro se litigants).

[213] *See Pro Se Resources by State*, *supra* note 202 (summarizing rules and ethics opinions throughout the country on limited assistance and unbundled legal services).

[214] State rules differ as to whether the scope of representation must be in writing. *See* Am. Bar Ass'n Standing Comm. on the Delivery of Legal Servs., *An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants*, AMERICAN BAR ASSOCIATION 5–7 (Aug. 2014), http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/communication.html.

[215] *See* ABA STANDARDS FOR PROGRAMS, *supra* note 196, § 3.3.

[216] MODEST MEANS TASKFORCE, *supra* note 190, at 92 (citing LTD. REPRESENTATION COMM. OF THE CAL. COMM'N ON ACCESS TO JUST., REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 9 (2001)).

[217] *See* MODEL RULES OF PROF'L CONDUCT R. 6.5 (relaxing conflicts of interest rules for lawyers who provide short-term limited legal services).

be vigilant to maintain the appearance and reality that conflicts will be identified and avoided. The CSCLSP service providers have instituted more stringent conflicts checks and screening to minimize the appearance of impropriety and to ensure that individuals can access services from the agency unrelated to child support.

There are a number of ethical issues for attorneys engaged in these projects to consider, including whether the jurisdiction should adopt a rule of procedure regarding limited assistance if one does not already exist, whether the jurisdiction should adopt a rule addressing ghostwritten procedures, and whether the jurisdiction should adopt rules clarifying when attorneys may communicate with opposing parties who are partially represented or receiving limited assistance.[218]

C. Forge Alliances with Partners who Can Build Infrastructure and Fill Gaps in Service

Court-annexed resource projects will not succeed without support and assistance from courts and other institutional players.[219] Court administrators must be willing to provide physical space for these projects. Judges must support resource projects by assisting pro se litigants within the ethical bounds of the law, referring appropriate cases, and respecting the ethical limits under which limited-assistance projects must operate. Attorneys and staff from government agencies or other institutional players must be willing to change practices and procedures that are prejudicial to pro se litigants. They must instead work with court-annexed resource centers to develop referral mechanisms and settlement practices that facilitate due process and resolution of high-stakes, pro se cases.

In addition, court-based resource projects are unlikely to be able to meet all of the needs of pro se litigants.[220] Leveraging the resources of other partners such as pro bono attorneys and law school clinics can help fill these gaps.[221] When eligibility, funding, or other constraints limit the services a program or project can provide, third-party partners can address these community needs. At the same time, these partners need

---

[218] MODEST MEANS TASKFORCE, *supra* note 190, at 116–19; *see also Pro Se Resources by State*, *supra* note 202 (summarizing rules and ethics opinions throughout the country on limited assistance and unbundled legal services).

[219] Bruce A. Green, Foreword, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713, 1743–44 (1999).

[220] *See* Engler, *supra* note 24, at 42–43 (asserting the need for supplementing court-annexed assistance programs with other forms of aid to prevent a forfeiture of rights by pro se litigants).

[221] ABA STANDARDS FOR PROGRAMS, *supra* note 196, § 2.6.

sufficient training and supervision to ensure that they are sufficiently knowledgeable about the law and procedures to provide quality assistance in time-pressured situations.[222] Furthermore, it is important to set realistic limits on what services partners can provide. Law students, for example, may not have enough experience to do same-day hearings, but they may be very capable, with adequate supervision, of providing information, limited advice, and negotiation services.

D. Address Underlying Structural Gaps to Ensure Meaningful and Long-Term Assistance

The impact of projects such as the Child Support Community Legal Services Project is limited unless underlying structural problems are addressed.[223] In the child support context, for example, barriers to employment must be rectified in order to reach long-term solutions.[224] Without supportive services such as employment training, job placement, mental health counseling, drug rehabilitation, and educational opportunities for those owing child support, court-annexed resource centers may just be providing services that offer a superficial, short-term fix to a long-term, structurally complex problem.[225]

Some jurisdictions have developed court-based employment resource programs that lawyers providing limited assistance can access for their clients. The Philadelphia child support court, for example, has hired a case manager who meets with obligors, assesses their needs, directs them to appropriate services, and follows up to ensure that the individual is pursuing needed resources.[226] Similarly, a circuit court in Northeast Indiana and the County Prosecutor's office have teamed up with a workforce development project to provide employment services to

---

[222] *See id.* §§ 4.7, 4.8.

[223] Interview with Su Sie Ju, *supra* note 133; interview with Tianna Gibbs and Ashley McDowell, *supra* note 131.

[224] *See* D.C. ACCESS TO JUST. COMM'N, *supra* note 21, at 60–61 (explaining that "those living in poverty are more likely to experience a number of different legal problems," and noting that the areas of D.C. "with the highest poverty rates frequently experience higher unemployment rates. . . . [I]n order to avoid termination and to preserve possible [welfare] benefits in the event of future need, it is very important for families to transition from welfare to other income—such as a combination of wages and child support—at the earliest opportunity.").

[225] *See, e.g.*, *id.* at 28 (proposing that problems faced by prisoners and ex-offenders in the civil justice system will only be solved with a wide-ranging approach to address problems in education, economic opportunities, access to drug and mental health treatment, housing, etc.).

[226] *See Domestic Relations*, THE PHILADELPHIA COURTS (2014), http://www.courts.phila.gov/common-pleas/family/dr/, <http://perma.cc/7HEK-A8K3> (explaining the kinds of support provided by the court in custody, child support, and other domestic relations matters, including referral to a "Support Masters Unit" and a "Networking for Jobs Program").

individuals who owe child support.[227] These projects address the underlying causes of unemployment and enhance the potential for limited legal services to have lasting effects.

VI. STATUTES OR COURT RULES REQUIRING MANDATORY APPOINTMENT OF COUNSEL OR AUTHORIZING DISCRETIONARY APPOINTMENT

In order to protect the due process rights of pro se indigent litigants and ensure the integrity of the judicial process, states should mandate the appointment of counsel in certain circumstances. Counsel should be appointed in all civil contempt proceedings where incarceration is contemplated as a remedy and the state is the moving party.[228] In cases in which the state is not involved, counsel should still be appointed for the defendant if incarceration is a possible outcome. If the court believes that appointment of counsel for the defendant unacceptably shifts the balance of power between the parties, then the court should be permitted to appoint counsel for a pro se indigent petitioner. A limited, same day appearance may be suitable in some contempt cases (*i.e.*, where issues are clear; witnesses or other evidence is available), whereas many cases will require full representation. Outside of the civil contempt context, states or courts should authorize discretionary appointment of counsel in paternity and child support matters when the complexity of the case, the stakes, or the capacity of the parties require it.[229]

A court-annexed limited legal assistance project can facilitate greater due process protections for pro se litigants; however, these limited services are not available or sufficient in all cases. A litigant may not meet eligibility criteria or may have a conflict that prevents the legal

---

[227] Ellie Bogue, *New Collaboration Will Help Delinquent Child-Support Parents Train for the Workforce,* THE NEWS SENTINEL, Jan. 8, 2014, http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20140108/NEWS/140109757/1005, <http://perma.cc/GL6R-8ZMU>.

[228] *See* Price v. Turner, 691 S.E.2d 470, 472 n.2 (S.C. 2010), *vacated,* 131 S.Ct. 2507 (2011) (noting that eleven states and five federal courts have held that counsel is required for civil contemnors facing incarceration, and that some state Supreme Courts have found counsel in civil contempt cases to be required as a matter of fair administration of justice); *see also* Cox v. Slama, 355 N.W.2d 401, 403 (Minn. 1984) ("We do not deem it necessary to decide whether a non-custodial parent is entitled to counsel on constitutional grounds. Pursuant to our supervisory powers to ensure the fair administration of justice, we hold that counsel must be appointed for indigent defendants facing civil contempt for failure to pay child support."); Resnick, *supra* note 70, at 92 (identifying several states which require appointment of counsel in civil contempt cases).

[229] *See, e.g.*, 750 ILL. COMP. STAT. 5/506 (2007) ("In any proceedings involving the support, custody, visitation, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities [attorney, guardian ad litem, child representative] to address the issues the court delineates.").

services provider from assisting that litigant.[230] Limited advice or one-day representation may not be adequate due to the complexity of the claim or affirmative defenses, the investigation or discovery needed, and other complicating factors.[231] The CSCLSP, for example, offers a continuum of services that is simply inadequate to assist pro se, indigent litigants involved in complex contempt cases, particularly in cases where government attorneys are moving forward with a contested evidentiary hearing and imprisonment for failure to pay is probable unless further investigation and trial preparation is undertaken. Similarly, in contested cases in which a pro se defendant is attempting to vacate a paternity judgment or trying to defend against an arrearage enforcement action, limited advice or one-day representation will not suffice. There are also circumstances in which the capacity of a litigant is in question or the stakes are unusually high, even if the legal questions at issue are relatively straightforward, where more extensive representation may be necessary.[232] In these circumstances, if an attorney from a resource center is not able to provide full representation, then the court should be required, or at least have the discretion, to appoint an attorney.[233]

States have determined that indigent litigants in certain types of civil cases must be appointed attorneys.[234] Most states, for example, require appointment of counsel for parents in termination of parental rights proceedings.[235] Many of these states also require that courts appoint a guardian ad litem to represent the best interests of the child in termination of parental rights and other child welfare proceedings.[236]

---

[230] *See, e.g.*, D.C. ACCESS TO JUST. COMM'N, *supra* note 21, at 10 (identifying failure to meet eligibility criteria as one of the most common reasons for turning away clients).

[231] *See* Zoe Tillman, *Program a 'critical way' to level playing field*, NAT'L L.J. (July 23, 2012), *available at* http://www.dccourts.gov/internet/documents/Premium-Access-Article-Legal-Times.pdf, <http://perma.cc/D3X5-437D> (noting that same-day representation fills a void for pro bono representation, but cannot resolve cases where proceedings cannot be quickly completed); *see also* Administrative Order 14-10: Limited Appearances in the Civil Division, Probate Division, Tax Division, Family Court, and Domestic Violence Unit, Super. Ct. D.C. (prohibiting limited-scope representation in jury trials).

[232] Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97, 115 (2010).

[233] Engler, *supra* note 24, at 49.

[234] *See* Am. Bar Ass'n Standing Comm. on Legal Aid and Indigent Defendants, *Directory of Law Governing Appointment of Counsel in State Civil Proceedings*, AMERICAN BAR ASSOCIATION (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_judges_manual_appendix.authcheckdam.pdf.

[235] *See, e.g.*, S.C. CODE ANN. § 63-7-2560(A) (West 2008) ("Parents, guardians, or other persons subject to a termination of parental rights action are entitled to legal counsel. Those persons unable to afford legal representation must be appointed counsel by the family court, unless the defendant is in default."); MONT. CODE ANN. § 41-3-425 (West 2013) ("Any party involved in a petition filed pursuant to [a neglect or abuse proceeding] has the right to counsel in all proceedings held pursuant to the petition.").

[236] *See, e.g.*, S.C. CODE ANN. § 63-7-2560(B) (West 2008) ("A child subject to any judicial proceeding under this article must be appointed a guardian ad litem by the family court. If a guardian

Congress and state legislatures have enacted laws giving judges the discretion to appoint counsel in other circumstances.[237] Pursuant to the federal *in forma pauperis* statute, a federal court may approve a party's request to appoint counsel on the basis of indigence.[238] Requests for appointed counsel frequently arise in federal civil rights cases.[239] For example, in *Santiago v. Walls*,[240] the United States Court of Appeals for the Seventh Circuit held that the trial court should have used its discretion to appoint counsel for an indigent inmate who had filed a Section 1983 action against a correctional institution and its prison guards.[241] The court found that the case required extensive discovery that the inmate could not conduct on his own.[242]

In many states, family court and probate judges have the discretionary authority to appoint guardians ad litem in custody, abuse and neglect, and guardianship cases.[243] Judges in child custody cases, for example, may appoint a guardian ad litem when the court determines that the parents of the child are not adequately protecting or representing the child's interests.[244] As part of the decision whether to appoint counsel, state statutes require that the judge consider factors such as the complexity of the issues presented, the nature of the evidence to be presented, and the ability to gather information about the case from other sources.[245]

---

ad litem who is not an attorney finds that appointment of counsel is necessary to protect the rights and interests of the child, an attorney must be appointed.").

[237] 28 U.S.C.A. § 1915(e)(1) (2012). *See also* Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL. 245 (July–Aug. 2006) (highlighting and categorizing hundreds of state statutes and court rules ensuring the right to counsel in civil matters).

[238] 28 U.S.C.A. § 1915(e)(1) (2012).

[239] *See generally* Luther M. Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel?*, 39 WASH. & LEE L. REV. 1267 (1982).

[240] 599 F.3d 749 (7th Cir. 2010).

[241] *Id.* at 765.

[242] *Id.* at 762.

[243] *See, e.g.*, MINN. STAT. ANN. § 518.165(1) (West 2013) ("In all proceedings for child custody or for dissolution or legal separation where custody or parenting time with a minor child is in issue, the court may appoint a guardian ad litem to represent the interests of the child."). *See generally* APPOINTMENT PROVISIONS FOR GUARDIANSHIP CASES, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/legalservices/probono/childcustody/guardianship_chart.pdf, <http://perma.cc/TJ7V-39W6> (last updated Jan. 2007).

[244] *See e.g.*, MINN. STAT. ANN. § 518.165 (West 2013) (granting the court discretion to appoint a guardian ad litem to represent the interests of the child in all proceedings for child custody or where custody or parenting time with a minor child is in issue); *see also* CAL. FAM. CODE § 7647.5 (West 2014) ("A guardian ad litem may be appointed for the child to represent the best interests of the child.").

[245] *See, e.g.*, 750 ILL. COMP. STAT. 5/506(a-5) (West 2007) ("In deciding whether to make an appointment of an attorney for the minor child, a guardian ad litem, or a child representative, the court shall consider the nature and adequacy of the evidence to be presented by the parties and the availability of other methods of obtaining information, including social service organizations and evaluations by mental health professions, as well as resources for payment.").

Court-annexed resource centers and other unbundled legal-assistance projects are not a panacea that eliminate the need for civil *Gideon*. These projects, as comprehensive and effective as they may be, cannot provide the due process protection that *Turner* requires by employing alternatives to full representation. A careful consideration of circumstances under which appointment of counsel is necessary, similar to the analysis that states such as California are undertaking, is needed to ensure that "due process" is accorded in civil contempt and other complex paternity and child support matters.[246]

VII. CONCLUSION

The vague concept of alternate procedural safeguards outlined in *Turner* ignores the complexities involved in high stakes civil matters involving pro se litigants. A written form or routine questioning by a judge cannot provide the procedural fairness required in a substantively complex matter, in a situation in which the stakes are grave, or when the pro se litigant is operating under an impairment. Courts and the legal community must develop resources that offer progressive tiers of services tailored to litigants' circumstances, using qualified staff and incorporating practices that ensure ethical protection of clients.

Courts should not be lulled into a false security, however, that these legal resource centers will be sufficient to ensure efficient and effective administration of justice. Unless courts offer means for connecting to or partnering with community-based resources that can help address the underlying structural causes of issues such as failure to pay child support, then the impact of court-annexed resource centers is likely to be minimal. Similarly, courts and legislatures must recognize that there are circumstances which require same-day or full representation. In these circumstances, the court should be required to, or at least have the discretion to, appoint an attorney to ensure that the due process that *Turner* requires is realized.

---

[246] *See* Sargent Shriver Civil Counsel Act, CAL. GOV'T. CODE § 68651(b)(7) (West 2012) (identifying factors such as case complexity, the adversarial nature of the case, and literacy issues, among others, as criteria to be considered when determining the litigant's need for representation).

Notes

Race and the Fourth Amendment: Why the Reasonable Person Analysis Should Include Race as a Factor

Graham Cronogue[†]

[†] I would like to thank Professor Destiny Peery of Northwestern University School of Law for her wonderful advice and guidance, Matthew R. Triplett for his outstanding comments and encouragement, and the editors of TJCLCR, for the thoughtful feedback and diligent editing.

I. INTRODUCTION TO THE PROBLEM

On July 16, 2009, police responded to reports of a black male attempting to break into a home in Cambridge, Massachusetts.[1] After police arrived on the scene, they arrested the man for disorderly conduct and "exhibiting loud tumultuous behavior."[2] However, the "suspect" was not a criminal but one of the nation's preeminent scholars, Harvard University professor Henry Louis Gates.[3] How could such an esteemed scholar be mistaken for a criminal?

While theories about the incident vary, the most compelling reason is, unfortunately, all too clear: he was black. After Professor Gates was seized for allegedly breaking into his own home, Americans were forced to reexamine the "color-blind" nation toward which we were reportedly moving.[4] This specific incident was largely resolved following a "beer summit" hosted on the White House lawn, but Professor Gates's story is symptomatic of the broader racial problem plaguing our justice system.[5] It is an unfortunate reality that a person's race has a non-trivial impact on how that person is viewed and treated by law enforcement.[6] As Justice Stevens observed in *Illinois v. Wardlow*,[7] even innocent people in minority communities often "believe that contact with the police can

---

[1] Melissa Trujillo, *Henry Louis Gates Jr. Arrested, Police Accused of Racial Profiling*, HUFFINGTON POST (July 20, 2009), http://www.huffingtonpost.com/2009/07/20/henry-louis-gates-jr-arre_n_241407.html; Abby Goodnough, *Harvard Professor Jailed; Officer Accused of Bias*, N.Y. TIMES (July 20, 2009), http://www.nytimes.com/2009/07/21/us/21gates.html.

[2] Trujillo, *supra* note 1.

[3] *See id.*; *see also* HENRY LOUIS GATES, JR., http://www.aaas.fas.harvard.edu/directory/faculty/henry-louis-gates-jr.

[4] Richard Thompson Ford, *The Depressing Cycle of Racial Accusation*, SLATE (July 23, 2009), *http://www.slate.com/articles/news_and_politics/jurisprudence/2009/07/the_depressing_cycle_of_racial_accusation.html*.

[5] *See Obama: Police Who Arrested Professor 'Acted Stupidly'*, CNN, (July 23, 2009), http://www.cnn.com/2009/US/07/22/harvard.gates.interview/; Robert Tomsho, *White House 'Beer Summit' becomes Something of a Brouhaha*, WALL ST. J. (July 30, 2009), http://online.wsj.com/articles/SB124891169018991961.

[6] DAVID H. BAYLEY & HAROLD MENDELSOHN, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA 91 (1969).

[7] 528 U.S. 119 (2000).

itself be dangerous."[8] This self-perpetuating cycle of racial bias and maltreatment infects the enforcement and understanding of criminal laws. From responses to mandatory minimums[9] to policing of peremptory strikes,[10] courts have struggled to remedy the most invidious manifestations of racial bias in criminal law. One area of Fourth Amendment law plagued by racial bias has been largely overlooked by the nation's courts and legislatures: the seizure analysis.[11]

The Fourth Amendment to the United States Constitution provides constitutional protections for individuals unreasonably seized by state actors.[12] However, in order for any of these protections to attach, the individual must first show that he has been "seized" for Fourth Amendment purposes.[13] According to the Supreme Court's decision in *United States v. Mendenhall*,[14] a person has been "seized" for Fourth Amendment purposes only if "in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. . . ."[15] Thus, this objective test only asks whether a "reasonable person" in the defendant's situation would have felt free to terminate his contact with law enforcement.[16]

As is the case with many other reasonable person tests, there has been significant debate over whether and to what extent an individual's personal characteristics should be taken into account.[17] For instance, in *Mendenhall*, Justices Stewart and Rehnquist both stated that the defendant's race and gender were "not irrelevant" in their calculus.[18]

---

[8] *Id.* at 132.

[9] *See, e.g.*, SENTENCING COMMISSION ISSUES COMPREHENSIVE REPORT ON STATUTORY MANDATORY MINIMUM PENALTIES U.S. SENTENCING COMMISSION 2 (Oct. 31, 2011) ("Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to a mandatory minimum penalty at the highest rate of any racial group . . . ."); Nathan A. Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, ExpressO (2008) (on file with author) (discussing ways that judges can avoid imposing mandatory minimums; the solutions range from not following the statute to finding the defendant guilty of a lesser offense).

[10] North Carolina Racial Justice Act, N.C. Gen. Stat. § 15A-2010 (2009), http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H472v3.pdf.

[11] Though the New York "stop-and-frisk" campaign has breathed new life into questions surrounding racially-discriminatory stops, prohibitions on racial profiling do not address the analysis of whether a seizure has occurred or the profound impact such programs have on the expectations and attitudes of the victims of racial bias. *See, e.g.*, Floyd v. City of New York, 861 F. Supp. 2d 274, (S.D.N.Y. 2012) (analyzing "stop-and-frisk" under *Terry* stop standard).

[12] U.S. CONST. amend. IV. ("the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .).

[13] *See id.*

[14] 446 U.S. 544 (1980).

[15] *Id.* at 545.

[16] *See id.* at 550–52.

[17] *See, e.g.*, Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 J. GENDER, SOC. POL'Y & L. 633, 645–49 (2002) (discussing whether the reasonable person should consider gender and the effects of this determination).

[18] *Mendenhall*, 446 U.S. at 558 ("It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, neither were they decisive . . . .") (citation omitted).

However, the Court did not elaborate on the significance of these or other factors, except to say that age, race and gender were not "decisive."[19] As a result, contemporary analyses of seizures do not take into account the extent to which a person's race affects their ability and willingness to comply with the police.[20] These race-neutral approaches ignore the real and profound effect that race has on an individual's contact with law enforcement.[21]

In addition to critiquing the state of the social science literature, this Note argues that the feeling of being seized is not the same across all communities and races and that these differences should be considered under the seizure test enunciated by the Supreme Court. There is an understandable reluctance to treat individuals differently based on race in any context. However, race has been given great salience in American society, especially in American law enforcement, often causing people to treat individuals more positively or negatively based solely on that individual's race and preconceived notions about that racial group. This phenomenon of race-based treatment, in turn, affects how individual members of that racial group should likely react, based on their shared experiences and common expectations.

This Note analyzes the social-science evidence and argues that the Fourth Amendment seizure analysis should explicitly take into account a person's race. Since whether or not a person feels empowered to refuse a request from the police will be heavily influenced both by his perception of the police and by the way he believes the police perceive him, any factor that substantially influences these determinations must be considered. While a few scholars have discussed this issue, and even fewer have attempted to provide a solution to this problem, the existing literature has failed to provide an acceptable and scientifically-sound examination of the subject.[22]

This Note begins by setting out the current state of the law for seizures.[23] Next, the Note examines the current state of police and minority relations.[24] In an attempt to fill the holes in the current

---

[19] *Id.*

[20] *See* Peter A. Lyle, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 B.C. THIRD WORLD L. J. 243, 260 (2001).

[21] ERICA L. SMITH & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT NCJ 211471, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 1 (Carolyn C. Williams ed. 2006) (2002) (finding that roughly 22% of young black male drivers were searched at traffic stops for speeding, while only 8% of young white males were searched during similar stops). Since the New York stop-and-frisk controversy, the influence of race in police interactions has garnered significant media attention and likely has an even greater impact on minorities' views of police. *See, e.g.*, J. David Goodman, *Officers Are Told Race Can Be a Factor in Street Stops, but Not the Only One*, N.Y. TIMES (Nov. 25, 2013), http://www.nytimes.com/2013/11/26/nyregion/officers-are-told-race-can-be-a-factor-in-street-stops-but-not-the-only-one.html?_r=0 (discussing the influence of race on police stops).

[22] *See generally* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1988).

[23] *See infra*, p. 6.

[24] *See infra*, p. 8.

literature, this Note presents current social science data on race and consent and critiques how contemporary scholars have approached the subject.[25] Following a discussion of other scholarly approaches, this Note proposes how the courts can utilize this evidence to create a racially sensitive seizure test.[26] This Note concludes by considering potential difficulties with considering race in this context.[27]

II. STATE OF THE LAW ON THE REASONABLE PERSON AND SEIZURES

The Fourth Amendment protects against the unreasonable search and seizure of the person.[28] However, these protections are not automatically triggered during every encounter with law enforcement.[29] A seizure for Fourth Amendment purposes occurs only when "the officer, by means of physical force or show of authority, terminates or restrains [a person's] freedom of movement through means intentionally applied."[30] For instance, if an officer merely asks someone for the time of day, then he has clearly not "seized" this person. On the other hand, putting an individual in a police car or handcuffs clearly indicates an intention to restrain someone's freedom. In many other instances, an officer's intentions are ambiguous.

In the circumstances in which police actions do not "show an unambiguous intent to restrain [the individual], a seizure occurs if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[31] Given the significant room for interpretation regarding the impression a police officer creates when he approaches an individual, this "reasonable person" standard often becomes the key question in determining whether a seizure has occurred. Under the reasonable person standard, a seizure occurs only when these circumstances are "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave."[32] The reasonable person standard is necessarily an objective test that examines the situation from the standpoint of the average, "reasonable" person.[33]

Since different groups of individuals possess traits or share

---

[25] *See infra*, p. 16.
[26] *See infra*, p. 25.
[27] *See infra*, p. 42.
[28] U.S. CONST. amend. IV.
[29] Terry v. Ohio, 392 U.S. 1, 29 (1968).
[30] Brendlin v. Cal., 551 U.S. 249, 254–55 (2007).
[31] *Id.* at 255.
[32] INS v. Delgado, 466 U.S. 210, 216 (1984).
[33] *See id.* (holding that the "Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.").

common experiences that affect their responses, there has been significant controversy over the exact traits the "reasonable" person should possess in both the civil and criminal context. Should the reasonable person be the defendant's same age or gender? Or should the reasonable person instead have no gender or age and just be "average"? Since social categorical variables such as race, gender, and age could influence a person's decisions and views, the traits considered by the court have mattered a great deal in other contexts.[34] For instance, in determining whether a person was negligent, courts look to a reasonable person standard; however, in doing so, courts also consider whether the individual was very young[35] or had advanced training in the conduct at issue.[36] Such considerations can drastically alter the standard of care and can even be outcome determinative.[37] Similarly, the Supreme Court has held that, in certain instances, the consideration of age is appropriate in the Miranda custody analysis.[38] Therefore, it is now likely that young defendants will be afforded Miranda protections more often, and courts as well as police have increased guidance on treating young suspects fairly.[39]

The social science data suggests that an individual's perceptions of police and expectations of force or violence affect how that individual views law enforcement.[40] Despite these findings, the Supreme Court has not clearly defined what factors a court should consider in the seizure context. In *United States v. Mendenhall*,[41] the Court discussed the reasonable person standard in the seizure context.[42] The Court made it clear that this standard "presupposes an innocent person."[43] However, little else is known about him or her. In the *Mendenhall* plurality, the Court hinted that the defendant's race and gender "were not irrelevant"

---

[34] *See, e.g.*, Robert S. Adler and Ellen R. Pierce, *The Legal, Ethical and Social Implications of a "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV., 773, 798 (1993) (In sexual harassment cases, courts have differed in applying a reasonable person versus a reasonable woman standard in determining whether the conduct was "unwelcome" and "sufficiently severe and pervasive."); Shoenfelt et al., *supra* note 17, at 639 (discussing whether using the reasonable woman standard would actually alter outcomes or whether it would merely be a difference of semantics).

[35] *See* J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011) (considering a defendant's race in the Miranda custody analysis).

[36] *See* Cervelli v. Graves, 661 P.2d 1032, 1032–31 (Wyo. 1983) (finding that the court erred in "instructing the jury that it was not to consider a person's skills in determining whether that person is negligent").

[37] *See* Goss v. Allen, 70 N.J. 442, 448 (1976) (reversing lower court for using improper standard of care based on age).

[38] 131 S.Ct. at 2404 ("[s]o long as [a] child's age was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.").

[39] *But see* Christopher Jackson, J.D.B. v. North Carolina *and the Reasonable Person*, MICH. L. REV. ONLINE 1, 3 (2010) (arguing that this new standard might actually create more confusion for law enforcement).

[40] *See generally* BAYLEY & MENDELSOHN, *supra* note 6.

[41] 446 U.S. 544 (1980).

[42] *Id.*

[43] Florida v. Bostick, 501 U.S. 429, 438 (1991).

in their analysis, but they provided little additional guidance, leaving lower courts with no guidance on the value of race in the Fourth Amendment seizure context.[44]

III. POLICE AND RACE RELATIONS

Despite the Supreme Court's reluctance to recognize the impact of race, the social science evidence clearly shows that an individual's race profoundly affects how he views and is viewed by law enforcement.[45] Race blind standards inherently rely on one of two underlying assumptions: (1) race has only a trivial effect on the fair administration of justice; or (2) ignoring the effects of race on the administration of justice is justified by some greater benefit that could not be achieved by a justice system in which it is considered a relevant factor. In the world of street policing, these assumptions are flawed.

On the street, there is often an appreciable difference between how black and white individuals are viewed and treated by law enforcement.[46] Several studies suggest that police are more likely to view an African-American man as dangerous and threatening than they are to view a similarly situated and dressed Caucasian man.[47] As a result, blacks are often treated more aggressively by law enforcement.[48] Ignoring these misconceptions and racial disparities in treatment and misconceptions serves no overriding social interests and, instead, only perpetuates mistrust and feelings of governmental illegitimacy among members of minority communities and in society at large. The following section discusses how the popular misconception that blacks are somehow more dangerous has resulted in a system of over-policing and abuse within black communities. In turn, these and other minority communities have developed a profoundly different view of law enforcement, dramatically affecting how a member of such a community interprets encounters with

---

[44] 446 U.S. at 550–52.

[45] *See, e.g.*, Ronald Weitzer & Steven Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC'Y FOR STUDY SOC. PROBLEMS 305, 305 (2004) (finding that African Americans were more likely to view police actions negatively than were other racial groups).

[46] *See e.g.*, B. Keith Payne, *Weapon Bias: Split-Decisions and Unintended Stereotyping*, CURRENT DIRECTIONS IN PSYCHOL. SCI., 287, 87–89 (2006) (participants in a study "falsely claimed to see a gun more often when the face [shown] was black than when it was white. Under the pressure of a split-second decision, the readiness to see a weapon became an actual false claim of seeing a weapon.").

[47] *See, e.g.*, Joshua Correll et al., *Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues*, 47 (1) J. EXPERIMENTAL SOC. PSYCHOL., 184–89 (2012) (respondents more frequently shoot armed blacks than armed whites); Payne, *supra* note 46; BAYLEY & MENDELSOHN, *supra* note 6 ("there seems little doubt that interpersonal violence as well as violence directed against policemen is considered [by the police] more likely to take place in minority neighborhoods regardless of economic class.").

[48] Correll et al., *supra* note 47, at 184–89 (finding that participants shoot armed blacks more often than armed whites and make "don't shoot" responses more frequently and quickly for unarmed whites than unarmed blacks).

law enforcement.

A. Race Affects How Individuals Are Viewed and Treated by Law Enforcement

The first relevant paradigm is the blacks-as-aggressive paradigm.[49] As David Bayley and Harold Mendelsohn pointed out in their book on police and race:

> [t]he factor of race is clearly a specific clue in the policeman's world. Policemen associate minority status with a higher incidence of crime, especially crimes against the person, with bodily harm to police officers, and with a general lack of support of the police[50]

Police officers have been victims of attacks perpetrated by African Americans, perhaps causing police officers to approach black males with extra caution and aggression.[51] Moreover, whether it is caused by the legacy of slavery during the colonial era, the collective recollection of police beatings during the 1960's as blacks struggled for equality, or the persistent education, income, and achievement gap resulting from this legacy of abuse, many officers believe that "hatred and distrust of the police among some blacks has been around for a long time and continues today."[52] As a group, African Americans "are indeed involved in a disproportional amount of crime in general and violent crime in particular."[53] However, the instances of criminal activity across races are significantly less pronounced than the popular image portrayed in the media on shows like "COPS" or that seemingly shared by many police officers.[54] In fact, the majority of crimes committed in the United States

---

[49] *See, e.g.*, Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. OF CONTEMPORARY CRIM. JUST. 276, 278 (2007).

[50] BAYLEY & MENDELSOHN, *supra* note 6.

[51] *See generally* James Unnever & Shaun Gabbidon, *A Theory of African American Offending: Race, Racism, and Crime*, CRIMINOLOGY JUST. STUD. (2011) (stating that the arrest rate for young African Americans is overrepresented).

[52] Granville J. Cross, *The Negro, Prejudice, and the Police*, 55 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 405, 407 (1964) (citing surveys that show vastly disparate views of police "courtesy" and "misconduct" among races and finding that African Americans tend to view police actions with greater mistrust and hostility); *see also* Eric Baumer et al., *Institutional-Anomie Theory*, *in* ENCYCLOPEDIA CRIMINOLOGICAL THEORY (2010) (examining the strain theory, which argues that social structures which lead to inequality and deprivation in segments of its population indirectly encourage crime).

[53] Welch, *supra* note 49, at 278.

[54] *See id.* at 276–77; *see generally* LINDA G. TUCKER, LOCKSTEP AND DANCE: IMAGES OF BLACK MEN IN POPULAR CULTURE (2007) (discussing how representations in popular culture of criminal black men help perpetuate the stereotype). "In fact, white Americans in several geographic regions engage in higher rates of criminal activity." Leah J. Floyd et al., *Adolescent Drug Dealing and Race/Ethnicity: A Population-Based Study of the Differential Impact of Substance Use on Involvement in Drug Trade*, 36(2) AM. J. DRUG & ALCOHOL ABUSE 87, 88 (2010) ("Rates of drug dealing did not differ across race.").

are actually committed by white Americans, not black Americans.[55] While this conception of African Americans as violent is not grounded in fact or empirical evidence, it is widely shared, and influences the decision-making processes of many individuals.[56] For instance, the National Race Survey found that a majority of both white and black Americans agreed with the statement that blacks are "aggressive or violent."[57]

The chief problem with this stigma is that, even though the overwhelming majority of African Americans, like that of all other racial groups, does not act violently—toward the police or others— African Americans are often all painted with the same broad brush.[58] This distorted view may make it more likely that an African American will be viewed as a threat than will a similarly situated white person with similar intentions. While this issue can manifest in Harvard professors being arrested in their own homes, the more profound and lasting problem occurs in the "shoot or don't shoot" decision officers have to make on the street.[59] Unfortunately, reports of shooting deaths involving unarmed black males continue to dominate the headlines, and serve as harsh reminders of this disparate treatment. In addition to these more anecdotal examples as to how race affects expectations of violence, the social science evidence suggests that the individual's race has a non-trivial impact on the decision of whether deadly force is necessary.[60]

Several studies have analyzed whether race plays a factor in the split second decisions of whether an individual poses a threat of violence.[61] While the methodology for each study varied slightly, each test displayed images of either a black or white person and asked the participant to gauge the dangerousness of the individual.[62] For instance in one study, the images depicted an individual holding various objects, such as guns, bottles, and cell phones.[63] The participant was told to "shoot" any armed person by pressing one button and to "not shoot" any unarmed person by pressing a different button.[64] In another study, a

---

[55] Welch, *supra* note 49, at 277.

[56] *See* Cross, *supra* note 52, at 407.

[57] PAUL SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE (1993); *see also* JON HURWITZ, PERCEPTION AND PREJUDICE: RACE AND POLITICS IN THE UNITED STATES (Mark Peffley ed., 1998) (finding that a majority of individuals agree with a similar statement regarding violence and African Americans).

[58] *See generally* SNIDERMAN, *supra* note 57 (finding that a majority of individuals believe African Americans *as a group* are more violent).

[59] Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OREGON L. REV. 1, 3 (2010) (arguing that "[a]dvances in implicit social cognition reveal that most people carry biases against racial minorities beyond their conscious awareness. . . . Americans are faster and more accurate when firing on armed blacks than on armed whites.").

[60] *See, e.g.*, Payne, *supra* note 46, at 287–89; Correll et al., *supra* note 47, at 1314–15 (arguing that race impacts the decision regarding whether lethal force is needed).

[61] Payne, *supra* note 46, at 287–89.

[62] *Id.*; Correll et al., *supra* note 47, at 1314–15.

[63] Correll et al., *supra* note 47, at 1314–29.

[64] *Id.* at 1316.

picture of either a black or white face flashed on the screen briefly and was immediately followed by a picture of either a gun or a harmless object. In all of these studies, participants were more likely to identify the images associated with black individuals with danger.[65] As one scholar observed, participants in the flashed picture study "falsely claimed to see a gun more often when the face [shown] was black than when it was white. Under the pressure of a split-second decision, the readiness to see a weapon became an actual false claim of seeing a weapon."[66] Participants also shot unarmed black individuals more often than unarmed white individuals.

Police officers undergo considerable training to identify and respond to perceived threats. However, the social science evidence shows that, in addition to the intentional acts of race-based violence, racial bias and preconceptions can have a non-trivial effect on our subconscious or gut reactions.[67] Therefore, one popular image of African Americans leads to a scenario in which African Americans can expect to be treated with force or violence in more situations than a white person would.[68]

B. Race Affects How Individuals View Law Enforcement

While the predominant view in much of the United States may be that blacks, especially young black males, are more dangerous or aggressive toward police than the average individual, the more compelling, indeed truer, narrative in the police-minority relationship is the "blacks-as-law-enforcement-victims" paradigm.[69] As Don Jackson, a former police officer, observed in his New York Times piece: "[t]he black American finds that the most prominent reminder of his second-class citizenship are the police."[70]

American society has made many positive steps in terms of equal treatment across racial categories, there remains significant room for improvement, especially on the street. African Americans as a group have suffered racial profiling,[71] police brutality,[72] and other forms of

---

[65] Payne, *supra* note 46, at 287–89.

[66] *Id.* at 287–88.

[67] *Id.*

[68] *See id.*; *see also* Aaron Blake, *The Vast Majority of African Americans Say Police Unfairly Target Them*, WASH. POST (Aug. 14, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/08/11/in-ferguson-an-all-to-familiar-recipe-for-racial-discord/.

[69] *See, e.g.*, KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACRO AGGRESSION (1998) (discussing the "criminal black man" myth and stereotypical views of black aggression); Welch, *supra* note 49, at 276–77.

[70] Don Jackson, *Police Embody Racism to My People*, N.Y. TIMES, Jan. 23, 1989, at A25.

[71] *See Stop-and-Frisk Campaign*, NEW YORK CIVIL LIBERTIES UNION, www.nyclu.org/issues/racial-justice/stop-and-frisk-practices; Tracey Maclin, *supra* note 22; BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC 2005 (2007) ("blacks . . . were

humiliation to a degree and extent unmatched by any other group.[73] These shared experiences can shape how individual members of that group interpret police actions and inform each person's expectations of violence.[74]

The social science data suggests that, on average, an African American individual tends to view the motivations of police less favorably than a white person, as well as that the interaction will produce more harmful results. As a group, African Americans tend to have more negative interactions with police and less confidence that police will treat minorities equally in a given scenario.[75] Perhaps most importantly, for the purposes of the seizure analysis, a greater percentage of African Americans than white Americans believe that police engage in excessive force.[76] Exacerbating these problems of increased expectations of violence and negative interactions is the all-too-close correlation between race and socioeconomic status,[77] which leaves a higher proportion of African Americans depending on over-worked and under-paid public defenders or appointed counsel when they are charged with a crime.[78] This lack of financial means can also lead to a sense of powerlessness and increased fear of a negative result from police interaction.

Compounding the effect of these more personal interactions is the anecdotal proof of the effect of racial bias. As the Ferguson, Missouri, incidents demonstrate, contemporary culture and media are concerned about the potential for racially-motivated police violence. The events in Ferguson are an instructive example not only of how historic discrimination and racially-motivated violence can color how events are perceived, but also the profound effect that police altercations can have on an individual's or a community's feelings of fear or powerlessness

---

more likely than whites to be searched by the police.").

[72] *See e.g.*, POLICE MISCONDUCT STATISTICAL REPORT, NATIONAL POLICE MISCONDUCT STATISTICS AND REPORTING PROJECT (2010); *see also* Tucker, *supra* note 54; Unnever, *supra* note 51, at 46; Charles Pulliam-Moore, *UN Committee Condemns U.S. for Racial Disparity, Police Brutality*, PBS (Aug. 29, 2014), http://www.pbs.org/newshour/rundown/un-committee-condemns-us-racial-disparity-police-brutality/ (criticizing the United States for acts of police brutality and racial bias).

[73] *See* Don Wycliff, *Black and Blue Encounters* 7 CRIM. JUST. ETHICS 2 (1988) (discussing humiliating encounters with police).

[74] Weitzer, *supra* note 45, at 307 ("Citizen contacts with police officers have been found to influence general satisfaction with the police. Negative contacts tend to lower opinions of the police and have a stronger effect on attitudes than positive experiences.").

[75] *See, e.g.*, *Blacks Upbeat About Progress*, PEW RES., (Jan. 12, 2010), http://www.pewsocialtrends.org/2010/01/12/blacks-upbeat-about-black-progress-prospects/.

[76] Weitzer, *supra* note 45, at 314.

[77] *See, e.g.*, James House & David Williams, *Understanding and Reducing Socioeconomic and Racial/Ethnic Disparities in Health, in* PROMOTING HEALTH: INTERVENTION STRATEGIES FROM SOCIAL AND BEHAVIORAL RESEARCH (Brian Smedley ed., 2000); *Ethnic and Racial Minorities & Socioeconomic Status*, AMERICAN PSYCHOLOGICAL ASSOCIATION, https://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx.

[78] While public defenders are extremely effective advocates that perform an invaluable function, the sheer volume of cases creates a significant strain on the attorney-client relationship and also negatively impacts the actual, or at least the perceived, efficacy of representation. *See, e.g.*, Laurence Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIMINAL JUSTICE MAGAZINE 1, 2–5 (2011).

against the police. In Ferguson, Missouri, police killed a young and unarmed black male. The details of the shooting are ambiguous and each side involved presented a different interpretation of the what events actually caused the officer to fire his weapon, whether the young man was threatening the police or whether the police merely perceived him as a threatening black man. The incident was framed in the public discourse as a reminder that unarmed black males can still be the victims of police violence and that minority communities feel a greater threat from the police.[79] Regardless of whether this incident was proof that that the "blacks as aggressive" paradigm is still the norm, there is little doubt that this highly-publicized killing has had a greater impact on how blacks view police than it has on how whites view them.[80]

Accordingly, the social science data suggests that the legacy of historical discrimination and racially-motivated violence likely leads to different expectations of violence and differing views of how the conflict will be resolved. The following section examines how the current literature attempts to apply what we know about race and police relations to the seizure context.

IV. SOCIAL SCIENCE DATA ON HOW THIS LEGACY AFFECTS SEIZURES

The social science literature has documented this disparate treatment of African Americans as well as the effects of expectations of violence on an individual's free will. It has not, however, adequately connected these two problems to address the Fourth Amendment seizure question. Based on a thorough review of the social science literature on the subject, it appears that existing data is significantly underdeveloped, and scholars have been unable to provide a meaningful and robust examination of the effect of race on the Fourth Amendment seizure analysis.

In *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, Professor Maclin laid the still nascent foundation for conceptualizing race in this context.[81] Professor Maclin drew upon a large number of reports of police violence and abuse to argue that:

---

[79] Blake, *supra* note 68.

[80] *See Stark Racial Divisions in Reactions in Ferguson Police Shooting*, PEW RES. (Aug. 18, 2014), http://www.people-press.org/2014/08/18/stark-racial-divisions-in-reactions-to-ferguson-police-shooting.

[81] Tracy Maclin, *"Black and Blue Encounters" – Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 29 VAL. U.L. REV. 243, 243–45 (1991) (highlighting the problem of police violence directed towards African Americans and how it can force some individuals to acquiesce out of fear); *id.* at 268–69 (arguing that race should be considered in determining whether a police encounter constitutes a seizure under the Fourth Amendment).

> [S]ome black men go out of their way to be calm and extremely congenial when approached by a police officer. A black man's silence in the face of police demands should not be interpreted as cooperation, however. His silent exterior masks a complex reaction of fear, anger and distrust that must be kept under wraps in order to avoid a more violent and intense confrontation than history has too often shown places the black man in an overmatched and vulnerable position.[82]

In other words, according to Maclin, African Americans and other minorities have a profoundly different relationship with the police than do white Americans. If we accept Professor Maclin's premise that sometimes African Americans either only appear to consent or acquiesce out of fear of violence, then it follows that the Fourth Amendment seizure analysis for African Americans should incorporate this crucial information.[83] While this Note agrees with Professor Maclin's conclusion and ultimately accepts his premise, the social science evidence he marshals to support his claim is insufficient.[84] Therefore, this Note proceeds by highlighting the strengths and weaknesses of *Black and Blue*'s social science research, and attempts to shore up those weaknesses by applying data and logic from other social science research and related fields.

A. Analysis of the *Black and Blue* Methodology

Professor Maclin highlighted the problem of police violence directed towards African Americans and how it can force some individuals to acquiesce out of fear.[85] To the extent that it raises awareness of an issue and applies a complex set of ideas to a legal problem, Maclin's work is very successful.[86] The problem of police brutality is widely known, but its real-world effects on Fourth Amendment seizure jurisprudence have received very little scholarly attention. The methodology employed in Maclin's article satisfactorily illustrates the problem of racial bias and police brutality; however, the link between brutality and acquiescence received no social science support. Consequently, the major hole in the social science research in this field is the link between well-documented brutality and the practice of acquiescence due to a minority's fear of violence. Social science has

---

[82] *Id.* at 278.

[83] *See id.* (claiming that African Americans appear to acquiesce out of fear of violence).

[84] Courts cannot rely on mere conclusions and anecdotes when forming or clarifying the law, which could partially explain the reluctance of courts to explicitly discuss race in their seizure analyses.

[85] Maclin, *supra* note 81, at 243–45.

[86] Since it appears that this piece was designed primarily to raise awareness and highlight the problem of race in the seizure context, the critiques that follow only relate to problems associated with using the work as a piece of social science evidence, not the work's overall merit.

shown that African Americans, as a group, likely should be more fearful or concerned during an interaction with police; it has not yet shown, however, that this fear actually translates into a feeling of being "seized" in more scenarios.

The following section discusses Maclin's analysis of police brutality against African-Americans. In laying out this half of his argument, Maclin's article relies on empirical data and survey responses to capture the state of police brutality and perceptions of African-Americans. With regard to this crucial argument, his methodology appears to be relatively sound. Maclin sampled a wide variety of police reports, newspaper stories, and surveys.[87] However, some components of his methodology should be improved in order to produce a more accurate and reliable view of attitudes across races.

i. Reliance On Christopher Commission

The first major piece of social science evidence on which Maclin relies involves internal surveys and reviews of police departments, namely the *Report of the Independent Commission on the Los Angeles Police Department.*[88] This Commission, created in response to and just four months after the Rodney King beating and the subsequently heightened racial tensions in Los Angeles,[89] was tasked to provide a "full and fair examination of the structure and operation of the LAPD" and headed the Commission."[90] The "Christopher Commission," as it was later called, reviewed sixteen months of internal use-of-force reports and transmissions between squad cars and police stations.[91] The Commission also conducted a survey of 960 officers.[92] The officers were asked whether they believed "racial bias on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community."[93] 25.4% agreed with this statement, 55.4% disagreed, and 20.1% had no opinion.[94] Additionally, 27.6% of officers agreed that "an officer's prejudice towards the suspect's race may lead to the use of excessive force," while 15% expressed no opinion and 57.3% disagreed.[95]

Though the Christopher Commission succeeded in shedding some

---

[87] While Maclin used many different scholarly sources, this note discusses the most important and problematic pieces.

[88] INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 69 (1991) [hereinafter "Christopher Commission"].

[89] *Id.* at (ii).

[90] *Id.* at 73.

[91] *Id.* at 45.

[92] *Id.* at 65.

[93] Christopher Commission, *supra* note 88, at 69.

[94] *Id.* at 68–70.

[95] *Id.* at 49.

much-needed light on the problems associated with police activities in Los Angeles, there are two problems with using the Christopher Commission as the basis for empirical analysis. The first issue arises from an inherent problem in the Commission itself; and the second arises from attempts by Professor Maclin to apply the results of the commission to the views and opinions of African Americans.[96]

The Commission was independently created and did not involve LAPD personnel, but it still suffered from bias; it was convened specifically in response to the Rodney King beatings.[97] Designers of the study and those reading the police report were undoubtedly primed by the recent, shocking police brutality that spurred the Commission's creation.[98] For instance, when reviewing a squad-car-to-police-station transmission, the researcher's view of certain words or phrases may have been framed with the Rodney King incident in mind.[99] However, if the Commission had been convened well after the incident, or as part of a routine audit of police procedures, the outcome might have been different. Researchers would have been further removed and might have been able to view the department less prejudicially.[100] Researchers could not have been completely free of bias; however, this bias issue should have been addressed, especially since analyzing touchy and amorphous subjects like racial bias and police responses can depend to varying degrees on the researcher's frame of mind.[101]

Likewise, reports and transcripts of police conversations are poor proxies for measuring racial bias among police. These reports only show one side of the interaction. If police are the people we are trying to monitor,[102] then it is problematic to look to their account of the story when assessing behavior. This shortcoming is somewhat tempered by the

---

[96] Maclin, *supra* note 81, at 252–56.

[97] Christopher Commission, *supra* note 88, at (ii).

[98] *See id.* ("Our commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful . . . .").

[99] Christopher Commission, *supra* note 88, at (iii) ("Our staff has reviewed the Mobile Digital Terminal communications (MDTs) of the Department's patrol cars for six sample months drawn from a sixteen month period."); *but see id.* ("Our work has been informed by nine major computer-aided studies of documents and statistics that yield their own truths independent of after-the-fact opinions or reconstruction."). However, given the vast literature on implicit bias and the fact that researchers were tasked with analyzing the reports of a department who *had* engaged in racial violence, it is unlikely that bias was wholly absent.

[100] However, the researchers are likely to still be influenced by response bias. Response bias refers to a cognitive bias that occurs when a respondent believes he is supposed to give a certain answer. In this case, the Commission was convened to find racial bias. For a discussion of response bias and its effect on survey results, see Kathleen Mazor, *A Demonstration of the Impact of Response Bias on the Results of Patient Satisfaction Survey*, 37 HEALTH SERVS. RES. J. 1403 (2002) (researching response bias in patient satisfaction surveys and finding that response bias may significantly impact the results of patient satisfaction surveys). The researchers may have felt compelled to either not find racial bias or to find instances of racial violence to weed out.

[101] Unfortunately, there is no information about traits of the researchers that might affect bias, such as whether they lived in L.A. at the time of the incident, were white or black, or had any experience with police violence. *See* Christopher Commission, *supra* note 88, at Appendix II, 1–3 (including information on the participants of the study, but lacking information on the authors of the report).

[102] Christopher Commission, *supra* note 88, at i–iv.

fact that the Commission also reviewed reports from civil cases in which the victims of violence claimed injury in excess of $15,000 as a result of police brutality.[103] Though the researchers would get two sides of the story, this process suffers from selection bias and some problems with perspective. First, in order to file an effective claim an individual generally has to be able to consult a civil lawyer to which he has no constitutional right;[104] thus, in order to acquire a lawyer who works on commission, the plaintiff must have a good chance of winning, and the plaintiff's damages must be significant enough to provide an attractive fee for the plaintiff's attorney (who often is paid on a contingency fee basis).[105] Therefore, these claims will only reflect the views of those with enough money to afford an attorney or with strong enough evidence to ensure a decent settlement or verdict award. However, neither of these variables has anything to do with the moral or legal merit of the claim itself.

For instance, if the victim was isolated during the assault and there were no witnesses, then it is more likely that a lawyer would not be willing to accept the case, even if the police brutality was especially bad. Similarly, the individual would have to know his rights to obtain an attorney and also not fear repercussions from the police. Thus, these civil claims will not show the whole picture of police violence in Los Angeles. In fact, since the victims of the most extreme police abuse will also be the most fearful of incurring the wrath of the police by filing a civil claim against his aggressors, this method might miss the very claims researchers are trying to find, to say nothing of the countless claims that would be necessarily excluded from the Commission's $15,000 damage threshold.

Also, it is likely that both sides would harbor severe perspective bias. The Commission looked at both sides of the story in a manner similar to the way a court might.[106] However, both sides have an incentive to misrepresent and may simply not remember the events as clearly as they should. Importantly, these stories would not have the benefit of cross-examination—the tool employed to bring out the "truth."[107] Thus, the researchers would have been forced to piece together the events based on biased data.

In addition to some flaws in the methodology that could have led to overestimating or underestimating racial violence, there are significant problems with importing these kinds of analyses into Maclin's broader theory. Maclin's argument relies on the survey results from the

---

[103] *Id.* at 52–54.

[104] The courts do not pay for indigent defense in civil cases. Therefore, most indigent defendants can never get a civil lawyer.

[105] *See* 42 U.S.C. § 1988(b) (West 2014) (allowing for "reasonable attorney's fees" for proceedings in vindication of civil rights, but only if the party wins).

[106] *See* Christopher Commission, *supra* note 88, at 155 (discussing the level of evidence required for the deposition).

[107] LARRY S. POZNER, CROSS-EXAMINATION: SCIENCE AND TECHNIQUE (1993).

Commission, which were intended to capture the opinion of law enforcement about the level of police brutality and whether this brutality was racially motivated.[108] By contrast, Maclin's overarching theory focuses on the state of mind of African Americans when confronted by the police. While officer opinion shows the level of perceived violence from the perspective of the police, there may be a disconnect between these responses and the opinion of the African-American community that Maclin never fully bridges. In addition to the problems of utilizing the Christopher Commission to show racial bias, the empirical data currently employed is flawed.

ii. Reliance on Empirical Data

Empirics are useful in showing us what actually happens in the world. However, if the data compiled in an empirical study is not directly relevant to the ultimate conclusion, the data does not accurately reflect the world around us. Instead, a flawed dataset will create an incomplete picture or present a picture that may be skewed by irrelevant data. Specifically, any collection of empirical data must take into account perspective, and must also control for selection bias; *Black and Blue* does neither.

First, Maclin compiles stories from police department reports and media sources of violence against African Americans that focus on police tactics in response to specific instances of violence, such as brutality in response to a murder committed by a black man against a white man in Boston.[109] While this data would be useful for understanding how police respond to these *specific* scenarios and perhaps in examining how African Americans view law enforcement during these *specific* time periods, it is difficult to extrapolate from this dataset how African Americans view law enforcement generally, in all times and in all places. For instance, police brutality might be more or less likely after specific important events. These events would affect how individuals view certain police interactions.[110] More importantly, the "average" interactions with the police occur in the times between major events. Even if the empirical analysis included data not skewed by temporal difficulties, it would only be useful in examining the state of police violence generally. But the average individual responds based on his perceptions of police and his expectations of violence, not on police brutality statistics. Thus, even if the empirics created an accurate picture

---

[108] Maclin, *supra* note 81, at 243 n.2.

[109] *Id.* at 252.

[110] The availability heuristic refers to a psychological phenomena wherein a person makes judgments about the likelihood that certain events occurred based on prior experience and recent examples. For a discussion of this form of bias, see Amos Tversky et al., *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208–10 (1973).

of police violence against minorities, it is unclear whether this picture of violence actually reflects the *feeling* of being seized for minorities or any other group.

Second, by relying on newspaper accounts,[111] the piece fails to capture the effect of violence on the African-American community. As with the data examined by the Christopher Commission, *Black and Blue*'s data does not directly address how or whether blacks perceive police differently than other racial groups; rather, it reflects how journalists understand and perceive the violence.[112] While such reports would tend to suggest that blacks *should* be more concerned about the police (and these reports may, themselves, shape how African Americans view the police), they do not serve as an effective proxy for actual opinion. In other words, Maclin fails to connect the dots between police violence and black perceptions of police behavior when they are approached by police.

The Maclin study, while helpful in demonstrating and legitimizing the fear and sense of subordination felt by African Americans interacting with police, has several methodological flaws. However, despite these flaws, Maclin's paper represents the type of research that the courts should draw on in justifying the use of race as a relevant factor in its Fourth Amendment seizure analysis. Even with the empirical weaknesses addressed above, *Black and Blue* confirms what most Americans might already suspect: African Americans and other minorities have a profoundly different relationship with the police than do whites. In that sense, Maclin's study is a profound and positive step forward and suggests both a need for more rigorous study and for recognition by the courts of the integral role that race can play in an individual's opinion as to whether or not he has been "seized."

B. How Courts Can Create a Racially-Sensitive Seizure Test

As mentioned above, Maclin's work is important because it begins to lay part of the theoretical framework for changing Fourth Amendment seizure law. However, its utilization of social science evidence leaves much to be desired. Any future study will need to do what *Black and Blue* did not: bridge the gap between question and operationalization, thereby finding a more accurate and convincing means of assessing the views of minorities with respect to police encounters in everyday life. To further this goal, this Note identifies the most significant stumbling blocks in effectively examining the seizure questions that Maclin's piece failed to address. The studies must first work to establish a baseline

---

[111] Maclin, *supra* note 81, at 250–51, 250 n.32.

[112] This data looks only at the reports of violence committed by police and the claims of police brutality issued to the department.

which would predict how a reasonable man should respond before examining how the response of different racial groups measure up against this baseline.

i. Establishing a Baseline

The ultimate question in the Fourth Amendment context, which has not been adequately addressed in any "race and the Fourth Amendment" literature, is the extent to which the feelings of the African American population might differ from the general population when confronted by police. Relative subordination bears directly on the question of whether an average African American will feel more or less "free to leave" than the average person. Thus, only by first determining a baseline is it possible to assess whether or not African Americans feel more pressured to comply than the "average" person.[113] Without a baseline standard, it is impossible to say whether the reasonable person standard disadvantages minorities or advantages any other group.

The following analysis demonstrates the two most important factors affecting an individual's response to police interactions: obedience to authority figures and intimidation. If a person remains and complies with law enforcement because he feels that he generally should obey authority figures, then he is not seized.[114] However, if an individual remains with the police because he feels intimidated by them or restrained by the threat of force or violence, then he has been seized for Fourth Amendment purposes.[115] Thus, the new methodology should first nail down how the race-neutral reasonable man should be expected to feel around law enforcement on the street.

a. Obedience to Authority Figures

The decision to consent to searches or to terminate interactions with law enforcement is affected by many factors; however, a person's

---

[113] Justice Breyer noted this problem during oral arguments in *Brendlin v. California*:

> So what do we do if we don't know? I can follow my instinct. My instinct is he would feel he wasn't free because the red light's flashing. That's just one person's instinct. Or I could say, let's look for some studies. They could have asked people about this, and there are none . . . what should I do? . . . Look for more studies?

Oral Argument at 43:00, Brendlin v. California, 551 U.S. 249 (2007) (No. 06-8120), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_06_8120.

[114] *Brendlin*, 551 U.S. at 254–55 (seizure occurs when "the officer, by means of physical force or show of authority, terminates or restrains [a person's] freedom of movement through means intentionally applied.").

[115] *See id.*

obedience to authority is perhaps the most salient. The social science data demonstrated that many individuals, when given a request by authority figures, will simply comply, even if compliance is against their own self-interest.[116] In an article reviewing social science evidence on coercion, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, Professor Janice Nadler analyzes the actual behavior of individuals when confronted by authority figures.[117] The most relevant component of her piece for this Note's purpose is the analysis of compliance research.[118]

Professor Nadler found that "persons with [police] authority exert an enormous amount of influence over our decisions."[119] Since police officials appear to "possess information and power that is greater than our own . . . the extent to which we feel free to refuse to comply under situationally-induced pressures . . . is extremely limited."[120] From an early age, individuals learn that taking the advice of authority figures "is beneficial for us, both because of their ability to enlighten us and because we depend on their good graces."[121] Therefore, Nadler reasons, when facing a request from the police, Nadler reasons, individuals typically see compliance as being in their best interests, for either personal or social reasons.[122]

The major study on which Nadler relies comes from the now infamous Stanley Milgram experiments, which investigated the level to which individuals comply with authority requests.[123] In this study, individuals who volunteered to participate were told to assume the role of either "teacher" or "learner."[124] The teachers were informed that their task was to teach a series of words to the learners.[125] However, the teacher was also told to administer shocks to the learners each time they made an error in recalling the word.[126] If the subject questioned the administration of shocks, the experimenters were simply told, "please continue" with the shocks.[127] If the subject (teacher) insisted that the experiment must end, the experimenter told him, "you have no other choice; you must go on."[128] Even though the teachers believed the shocks

---

[116] Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 202 SUP. CT. REV. 153, 200 (2002).
[117] *Id.*
[118] *Id.*
[119] *Id* at 173; *see also* Robert Cialdini & Melanie Trost, *Social Influence: Social Norms, Conformity and Compliance*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 168 (Daniel T. Gilbert et al. eds., 1968).
[120] Nadler, *supra* note 116, at 173.
[121] *Id.* at 174.
[122] *Id.* at 174–76.
[123] Stanley Milgram, *Behavioral Study of Obedience*, 19 J. ABNORMAL PSYCHOL. & SOC. PSYCHOL. 371 (1964).
[124] *Id.* at 373.
[125] *Id.*
[126] *Id.* 373–374.
[127] *Id.* at 374.
[128] Milgram, *supra* note 123, at 374–75.

were real, 100% of subjects continued shocking the learner after the learner protested that he was in pain.[129] However, even more surprisingly over 65% of the subjects continued administering shocks until the very end of the experiment, even after the warning: "danger: severe shock."[130]

The Milgram study highlights some horrifying facts about individuals and compliance with authority, some of which can apply to the Fourth Amendment context. First, the experimenters in white lab coats strongly resembled the police with badges.[131] Like police uniforms, white coats suggest a high position in the social hierarchy and specialized knowledge, perhaps leading individuals to believe that compliance is in their best interests. Similarly, beliefs that police have more information and that compliance is better for the individual have led to false confessions in other contexts.[132] Since complying with a simple request is a less extreme response than the well-documented practice of false confessions, it stands to reason that an individual's obedience to authority would factor heavily in the seizure calculus.[133] Second, in both situations the individuals do not have a solid understanding of the science or law at play; therefore, they are more likely to comply with the advice of the expert.

However, there are some difficulties with importing this analysis into the Fourth Amendment context, many of which the study itself acknowledges. Namely, the instructions "you must" and "you have no choice,"[134] when used in the context of a police interaction, would certainly indicate that the police have seized an individual and have intentionally coerced him. Therefore, nearly all of these situations would count as a seizure under existing Fourth Amendment law.[135] The Milgram study also contained a selection bias: in order to participate, individuals had to be willing to shock other people. This selection bias would help explain why every single participant was willing to obey and shock someone.[136] Finally, the study did not have a control group. For instance, half the participants could have been asked to do the shocks without being subjected to any kind of authority; the instructions could have been in the form of an instruction manual or pre-recorded tape. If these uncoerced people were less likely to give shocks, then the study would more strongly support the idea that authority influence matters.

Despite the few significant problems identified above, the results of

---

[129] *Id.* at 376.

[130] Nadler, *supra* note 116, at 176.

[131] *See id.* at 177.

[132] *See* Saul Kassin & Katherine Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996).

[133] *See id.*

[134] Milgram, *supra* note 123, at 848–52.

[135] *See id.*

[136] This selection bias is similar to the bias in death-qualified juries. By picking only those who are openly receptive to giving the death penalty, these trials are significantly skewed in favor of the prosecution. *See* George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).

the Milgram study are astounding and tend to suggest that individuals often feel compelled to comply simply because of societal pressures or other pressures inherent in interactions with the government. However, further research is required to isolate the effects of authority on individual compliance. Until the effect of authority is isolated, it is difficult to even say what the race-neutral reasonable person would do in certain situations.

b. Intimidation

In his article *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, David Kessler employs an empirical study to analyze the conditions under which average individuals feel free to leave and under which conditions they do not, or do feel seized.[137] This empirical analysis provides an important contribution to the field of criminal law and enforcement, especially because it is one of the only studies of its kind.[138] The study included 406 randomly selected people in the Boston area and presented them with a series of three-part questions.[139] The first part set out two police interaction scenarios: on the street and on the bus.[140] After reading the prompt, the individuals indicated whether they felt free to leave the situation on a scale of 1 (not free to leave or say no) to 5 (completely free to leave or say no).[141]

The second part of the questionnaire involved the same scenarios, asking respondents to indicate which of four different options described their legal rights on both the sidewalk and the bus.[142] The answers were set on a range from 1, the greatest legal obligation to comply, to 4, the lowest legal obligation to comply).[143] Importantly, 4, was the doctrinally correct answer.[144] Finally, the survey captured ages, genders, races, and whether the police had stopped the individual before; however, it did not comprehensively consider or control for the effects of these factors.[145] This failure is significant because each of these factors might influence whether an individual feels free to leave, thus skewing the ultimate result.

The average free to leave score for the sidewalk scenario was 2.61,

---

[137] David Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 53 (2009).

[138] *Id.* ("This Article presents the first set of empirical evidence that addresses whether or not actual people would feel free to terminate simple encounters with law enforcement officers.").

[139] *Id.* at 69.

[140] *Id.*

[141] *Id.*

[142] Kessler, *supra* note 137, at 70.

[143] *Id.* at 68–73.

[144] *Id.* at 70.

[145] *Id.* at 71.

and for the bus, 2.52.[146] Thus, people were likely to feel more obligated to comply with the police requests than they doctrinally should.[147] Importantly, even people who knew they were legally able to leave responded that they still did not feel free to leave.[148] Based on these findings, Kessler's paper demonstrates that the average person often feels compelled to comply with a police officer's request, even when they know they have a constitutional right not to.

These survey results tend to show that there is a significant disconnect between an individual's understanding of his legal rights and feeling compelled to obey. Kessler's study is also very useful in that it provides empirical support for the claim that individuals are intimidated into not exercising their constitutional rights during encounters with law enforcement. Thus, one could argue that the "reasonable person" is someone who is already at least non-trivially influenced by the intimidation aspect of law enforcement or simply does not understand his rights.

However, several issues in this study make it difficult to wholly import it into the seizure analysis. First, the survey itself suffers from considerable bias. The sampled group of 406 is probably large enough to yield a statistically significant result; however, the individuals in the group are not representative of the general population.[149] All of the people interviewed lived in Boston and the immediately surrounding area; as such, they may have had biases that people living in urban areas, the Northeast, or Boston might tend to have. While it is hard to precisely define these biases, geographical and urban/rural variables seem to, at least occasionally, correlate with views toward things like government authority and that, therefore, should have been controlled for.[150] Similarly, as the study recognized, all of the researchers asking the questions were Harvard University students, and all but one were white.[151] As a result, the sample may have been shaped by inherent or unrecognized biases in the researchers, affecting who they were more likely to approach. Since the methodology should aim to examine the effects of race and other variables, this is a very significant problem. Another problem could stem from a different selection bias: the respondents were all individuals who, when approached by a researcher, stopped and filled out the long questionnaire for free. These people might inherently be the type of people who are more likely to feel pressured into doing things. In fact, it seems that people who are most likely to feel either intimidation or pressure in police interactions would stop and

---

[146] *Id.* at 74.

[147] Kessler, *supra* note 137, at 70, 74.

[148] *Id.* at 74–76.

[149] *See id.* at 53–54.

[150] *See, e.g.*, Ralph Ioimo, et al., *Comparing Urban and Rural Police Views of Bias-based Policing*, 6 PROF. ISSUES CRIM. JUST. 53, 54–59 (2011) (discussing the difference between urban and rural police officers in awareness of racial bias in policing).

[151] Kessler, *supra* note 137, at n.110.

engage with a researcher upon being requested to do so.

A second problem with the survey is the very fact that it is a survey. Researchers are trying to capture how people react when intimidated by police.[152] While someone might be very self-aware[153] or have past experiences with the police and can recall how intimidating these experiences were, the vast majority of people will have no idea how pressured they would feel in an actual encounter with police.[154] Similarly, the hypothetical scenario cannot recreate the sense of pressure or intimidation that a uniformed, usually armed, officer can exert when stopping someone on the street.[155] Instead of being confronted by police, respondents were approached by nicely-dressed Ivy League students asking if they had a few minutes to spare.[156] Thus, the phenomenon researches were trying to understand is not even present when the information is gathered.[157]

A more appropriate study might ask individuals who had recently or at some point been stopped and questioned by the police whether they felt free to leave in that situation. While this process sacrifices the control over input that the hypotheticals in the survey provide, the real-world examples would provide a more realistic scenario: the respondents would have actually faced the stressor of police intimidation. In the world of police encounters, context matters. Therefore, the ability of a survey to operationalize the feelings of vulnerability, uncertainty, and fear that accompany a police encounter is simply too limited. Any future study using this approach would have to create some sort of quantification method for analyzing the police action objectively. Since each police action is unique, this process would involve a wide variety of inputs, and thus the sample size would have to be much larger.

A middle ground solution could be to have a simulated police interaction in which an actor playing an officer confronts volunteers. While this process would miss the true intimidation relationship that exists in a real police action (because participants would know that the encounter is fictitious), the simulated interaction would at least be able to replicate some aspects of a police encounter that give rise to intimidation, such as physical proximity. Moreover, the actors can read from the same script in every case, providing a very controlled input.

Despite these flaws, the evidence strongly suggests that intimidation and obedience to authority play a significant role in the feelings of most individuals, regardless of race. Therefore, any study of how African Americans feel around police must account for widely held

---

[152] *Id.* at 57.

[153] Nadler, *supra* note 116, at 146 ("Research confirms the difficulty of accurately imagining the extent to which situational constraints shape our behavior.").

[154] *See* Kessler, *supra* note 137, at 61.

[155] *Id.* at 68–71.

[156] *Id.* at 72.

[157] *Id.* at 68.

beliefs that affect every person's feelings and responses. Yet, the state of the literature regarding the average person's reaction to a possible seizure setting is still unsettled and needs further study. Research like that conducted by Nadler and Kessler provides examples of the types of empirics needed to accurately measure a baseline. However, as explained above, these papers also suffer from some flaws. Studies of how different races react to certain scenarios will be the most valuable when we can look at the average reaction for the general population and compare it to the reaction for each race. Still, studies that compare the reactions of different races without a baseline remain useful.

ii. Moving Away from the Baseline: Race

After establishing a baseline, the next difficulty is gauging how far away from that baseline each group's reactions fall. Specifically, studies need to analyze either how African Americans and other racial groups respond in this situation or pull from other social science research on similar issues. These studies will need to control for variables that are often closely associated with, but not inherently tied to, race.

While racial characteristics clearly have no intrinsic impact on a person's ability to understand his rights or willingness to end interactions with law enforcement, minority status is closely related to poverty and educational attainment levels.[158] Therefore, any study analyzing the effects of race on a person's willingness to disobey law enforcement would need to control for any other factors that similarly correlate with race. While there are many factors that could affect results, this Note focuses on socio-economic status.

Since race is so closely linked with socio-economic status, any study of racial decisions should control for its effects.[159] Indeed, many of the problems that affect minorities at a greater rate in modern society might actually stem from the problems associated with poverty or poor educational opportunities—or at least a combination of these—and experiences with discrimination.[160] For instance, the problem of the massive over-incarceration of African Americans stems from a variety of practices, such as discriminatory police actions and the fact that many young African Americans live in poor and heavily targeted neighborhoods.[161] While each variable is an important factor, it is

---

[158] POVERTY RATE BY RACE/ETHNICITY, HENRY J. KAISER FAMILY FOUNDATION (2012), *available at* http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/ (stating the rate of poverty across races).

[159] *See, e.g.*, David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, 896 U. MICH. INST. SOC. RES. 173 (1999).

[160] Of course, this problem with socio-economic status may exist largely because of racism and discrimination.

[161] *See e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF

practically impossible to determine which factor is the most significant or even precisely isolate the effect of any one variable.

However, in the Fourth Amendment seizure context, low socioeconomic status could manifest itself in two major ways: first, more frequent interactions with the police due to "economic profiling" and *Terry* stops; and second, lack of education or a decreased understanding of the legal system.

a. Increased Interactions with the Police: Individually and at the Community Level

Unfortunately, significant amounts of violence and drug-related arrests occur in areas suffering from poverty,[162] and it could be argued that poverty, not race, is a crucial factor in determining whether a person is seized under the Fourth Amendment. Vacant homes can be ideal stash houses; the best option for unemployed and uneducated people may often be to sell drugs; police tend to devote more of their resources to arresting people who are forced to live in these areas; and public resources for things like adequate lighting and after-school programs are often not "wasted" on the poor neighborhoods. This perfect storm of factors often makes poverty-stricken communities synonymous with "high crime areas."[163] As a result, these areas are heavily policed and, due to the Court's opinion in *Terry v. Ohio* and its progeny (which make it much easier for law enforcement to search people in high crime areas),[164] indigent people have many more interactions with police than the average population.[165]

However, increased police interactions might have different effects when viewed at the individual or community level. If a community is suffering from excessive *Terry* stops, the general population in that community might feel fatigued and more compliant, thus less likely to exercise their rights to walk away. On the other hand, the general community might feel outraged and less compliant. For instance, if the police have been harassing the community with a significant amount of *Terry* stops, one individual might be much less likely to comply with the

---

COLORBLINDNESS (2012); CRIMINAL JUSTICE FACT SHEET, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet (stating that 58% of all prisoners are minorities).

[162] *See* David Aaronovitch, *Could Poverty Lead Students to Prostitution and Drugs*, THE INDEPENDENT, (June 4, 1998), http://www.independent.co.uk/voices/could-poverty-lead-students-to-prostitution-and-drug-dealing-1162774.html.

[163] *See* Jeff Grabmeier, *Poverty, Not Race, Tied to High Crime Rates in Urban Communities*, OHIO ST. U. (April 2, 2013), http://researchnews.osu.edu/archive/badcomm.htm (arguing that poverty-stricken communities are often synonymous with high-crime areas).

[164] *Id.*; *see also* Jeffrey Fagan & Garth Davis, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L. J. 457 (2000).

[165] *See id.*

police out of anger, regardless of his race. Either way, individuals in the community can have different responses to the same stimulus, and the poverty factor could skew results either toward or away from compliance. Studies should focus on whether a person who experiences more frequent police interaction tends to become more legally savvy or less intimidated by the police, or whether the opposite is true.

However, one important difference in the seizure context that makes the effect of frequent police conduct less pronounced is that the Fourth Amendment inquiry focuses solely on whether the individual felt free to leave. Since this inquiry looks to the individual's mindset and whether he felt free to exercise his rights at a specific time, the fatigue or outrage issue might be somewhat less important. If someone complies because he has merely given up, and not because he felt forced to comply, then he probably has not been seized for Fourth Amendment purposes at all.[166] Therefore, though the actual decision to comply will be heavily influenced by the high number of interactions with police, a person's feelings as to whether or not he has the right to leave will be less affected. In fact, it seems that the two major effects of police contact that affect the seizure calculus will only be either increased or decreased fear of the police or an increased understanding of the legal system.

b. Understanding of the Legal System

As discussed above, frequent police contact might make a person more legally savvy and more likely to terminate his interactions with the police. However, poverty has an adverse effect on this variable as well. Individuals growing up in poverty are less likely to have a college degree or any training in law.[167] Accordingly, these individuals tend to have a lesser understanding of their constitutional rights, and are less likely to invoke them during police encounters.

However, if the new research method uses the police actor with a pre-recorded script as suggested above, researchers can actually test people's legal understandings of specific scenarios. When respondents are asked to participate, they can also be asked to include their income and educational status and whether (either in the affirmative or using a sliding scale) they were legally free to leave in that situation. In this way, the study could compare whether there is a relationship between poverty and legal knowledge. Furthermore, this additional metric would help to reinforce existing studies that seek to examine whether there is a meaningful disconnect between someone knowing they possess a

---

[166] This person would still be free to leave, but has consented to stay.

[167] *See, e.g.* Helen Ladd, *Education and Poverty: Confronting the Evidence*, J. POL'Y ANALYSIS & MGMT. 203, 205 (2012) (stating that there is a correlation between income and reading and math scores).

constitutional right and whether that same person will feel free to exercise it during a police interaction.

c. Expected Impact of the Controlled Variables

While race correlates with socio-economic status, and socio-economic status is often linked to demographic variables like education or familiarity with the police, it is likely that the effects of poverty will only have a marginal impact on the results of the study. Again, the study should seek to understand whether the internal process of feeling free to terminate interactions with law enforcement is affected by race; thus, whether someone chooses to terminate the interaction for reasons of fatigue or anger is largely irrelevant because he still felt free to leave. Since the effects of poverty most strongly affect the *decision* to leave and not the *feeling* of seizure, poverty is not likely to be very important in this calculus. Instead, the most important consideration is whether the individual *felt* intimidated, *felt* coerced, or actually expected violence.

In a *New York Times* article, Don Wycliff, a civil rights activist, observed that a black man's economic success, business acumen, or position in the community often has little impact on how he is treated by law enforcement:

> Even black men who share no other problem with the black underclass share this one. The most successful, respectable black man can find himself in a one-sided confrontation with a cop who thinks his first name is 'Nigger' and his last name is 'Boy.'[168]

This admittedly anecdotal evidence suggests that interactions with law enforcement are sometimes shaped by only one characteristic: race.

The most comprehensive study on African American views of police, which also controls for social status, came from social scientists Geoffrey Alpert and Roger Dunham.[169] In their work, entitled *Policing Multiethnic Neighborhoods*, the authors examined attitudes of people of different races in the Miami-Dade area with respect to law enforcement.[170] In their study, Alpert and Dunham interviewed members of different races to ascertain their feeling toward law enforcement.[171] They found that race was a key determinant in a person's views of law enforcement.[172] After randomly selecting respondents in the greater

---

[168] Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 8, 1987, at 22.

[169] GEOFFREY P. ALPERT & ROGER G. DUNHAM, POLICING MULTIETHNIC NEIGHBORHOODS 125–26 (1988).

[170] *Id.* at 125.

[171] *See id.*

[172] *Id.*

Miami area, researchers asked respondents opened-ended questions about their attitudes toward law enforcement.[173] The major strength of this study is that it asked a wide variety of questions and allowed for open-ended responses, which prevented the surveyed respondents from being restricted in their answer choices.174 Moreover, it minimized the effects of any bias in a single question or group of questions.175 Additionally, the data was representative of the community it was attempting to understand, with respondents coming from middle-class black neighborhoods, government-subsidized housing projects for low-income African Americans, two large neighborhoods with substantial Cuban populations from a variety of socio-economic backgrounds, and a Caucasian neighborhood with wide varieties of economic backgrounds.[176] The study found that wealth was not an important factor in a person's views of law enforcement to black people:

> Even though there are important differences between blacks in the middle-class neighborhood and the poor blacks, overall they are much more negative and suspicious toward the police than [other ethnic groups.] [African Americans] do not view the police as their agents of social control, and perceive a disjuncture between the formal control system and their system of informal control. Rather, they tend to view the police as representatives of the majority class. This is an especially interesting finding in light of the numerous differences between the two black neighborhoods. In spite of their different views on specific issues, they share this general conflict orientation.[177]

In other words, poverty seems to have little effect on feelings toward police;[178] instead, the study suggests that the person's race influences his feelings toward the police. Indeed, as Professor Gates' example illustrated, during police interactions, even wealthy and educated men can be defined largely by their race.

Therefore, it makes sense that certain racial groups experience a similar reaction to law enforcement situations regardless of their wealth or status—race is a more clearly visible factor than wealth or education level. After all, police typically cannot immediately determine whether a person is educated or wealthy; they typically can, however, immediately determine his race. Since expectations of violence or actual intimidation are most likely determined by race, it seems as if economic status will

---

[173] *Id.* at 41–42.
[174] *See* ALPERT & DUNHAM, *supra* note 169.
[175] *See id.*
[176] *See id.* at 125–29.
[177] *Id.* at 125.
[178] *See id.* at 125–26.

not be the most important variable.[179]

C. Expected Results of the Study

The above analysis demonstrates that studies on the reasonable person and race will have to control for socio-economic status and create a baseline for determining how the average person reacts in a situation. After looking at the theoretical literature, this author anticipates that any empirical study of African Americans in the seizure situation will reveal that this group is more likely to feel seized. The legacy of violence by police against African Americans—from the Rodney King incident[180] to beatings in post-Katrina New Orleans[181]—is likely to be in the forefront of an African American's mind when he or she is stopped by the police.[182] These expectations of violence, coupled with the mass incarceration of black males, undoubtedly leads to a sense of helplessness that is not present in law enforcement interactions with whites. Therefore, the courts should take account of an individual's race when determining whether a person has been "seized."

V. DIFFICULTIES WITH APPLICATION

Despite the influence of race, it is clear that the formal consideration of race raises certain problems. For instance, not all minorities will have similar feelings or reactions to the same situation. Moreover, it will be hard to know to what degree race factors into feelings of "seizure," since perceptions of treatment based on race will vary across geographic regions and economic circles. The consideration of race can also create a substantial line-drawing problem, and the courts must still grapple with the complicated issues that the consideration of race will create. However, the uniformity of enforcement, line drawing, and pragmatic concerns are less problematic than the current regime.

A. Uniformity

The courts have assumed that the reasonable person is a law-

---

[179] BAYLEY & MENDELSOHN, *supra* note 6, at 91.

[180] Lynn Elber, *Rodney King Video of Beating Helped Drive Revolution*, HUFFINGTON POST, June 18, 2012, http://www.huffingtonpost.com/2012/06/18/rodney-king-video-of-beat_n_1607177.html.

[181] Trymain Lee, *Tales of Post-Katrina Violence Go from Rumor to Fact*, N.Y. TIMES, Aug. 26, 2010, http://www.nytimes.com/2010/08/27/us/27racial.html?pagewanted=all.

[182] *See* Cross, *supra* note 52, at 407.

abiding individual, but little else is known about this fictitious person. The Supreme Court has refused to examine whether the person's race should matter, and has opined only that the person's age and gender are "not irrelevant." Perhaps this refusal has been guided by the desire to achieve uniform treatment under the Fourth Amendment. After all, the chief benefit of a "race-blind" reasonable person standard is that it ensures consistency of outcomes for all citizens. Since the standard appears uniform and objective on its face, no white person can complain that the doctrine is unfair to him because of his race.

However, the issue is that African Americans, victims of historic and wide-spread discrimination, are not getting equal treatment. Under the current system, a white person, who is the least likely to feel seized because of his race, will receive the beneficial protection of a reasonable person standard that also takes into account the reactions of groups that have been discriminated against and are more likely to feel seized due to race. Thus, this standard will be skewed to find that a white person has been seized, even if a reasonable *white* person would not feel seized because he/she is less fearful of police. On the other hand, the general reasonable person standard applied to African Americans will significantly discount the importance of the views of people in their community; it will be heavily skewed toward the reasonable white person's perceptions.[183] Since the Fourth Amendment seizure analysis, as articulated by the Court, seeks to determine whether a person feels that he is seized, and a person's race can affect how he will feel, the consideration of race actually promotes uniformity and fairness.

B. Line-Drawing Problems and Over-Inclusiveness

The intricacies that arise when attempting to understand all facets of the "reasonable person" analysis appear overwhelming. Naturally, courts will have to demarcate more salient traits, as the Court did with age and gender, from less salient ones. However, race has become so inextricably intertwined with attitudes toward police and police attitudes toward individuals that it surely is *as* relevant as factors like age and gender. Therefore, the consideration of race will not create line drawing problems because it is already above the "line" created by the Court in other contexts.

Still, most people of a certain race do not have the exact same experiences and views toward law enforcement. Indeed, many white Americans in certain communities will have substantially more run-ins and negative experiences with police than the average minority American. Similarly, many African Americans are members of law

[183] A consideration of race might actually make it less likely that a white individual will receive the benefits of Fourth Amendment protections.

enforcement, or otherwise have a more positive relationship with the police. Naturally, for these individuals, race will be less likely to drive their view of police. However, the presence of a few outliers, or even of relatively large numbers of African Americans whose "seizure" views are not colored by their race, does not indicate that race should be ignored in the seizure context.

First, the reasonable person standard has routinely considered a variety of issues, each of which, on its own, might be indeterminate. Second, the presence of outliers has never prevented courts from considering traits that usually affect determinations or understanding. For instance, the age of a defendant is considered in the *Miranda* custody analysis.[184] While youth does not always mean immaturity, it is largely suggestive of immaturity in most cases. Similarly, courts consider the relevant training and education of defendants in negligence cases to determine how that person should be expected to act. However, every individual's ability to learn, understand, and respond to training is heavily influenced by intensely personal characteristics such as IQ, education, and work ethic. Despite the possibility that some highly trained individuals will still not be skilled, the reasonable person standard explicitly considers advanced training.[185]

C. Pragmatic Concerns

In addition to the theoretical issues, consideration of race presents a possible practical problem. Since race tends to make it more likely that a person will be seized and receive Fourth Amendment protection, adoption of the standard will result in more inadmissible evidence and fewer convictions. The consent search is a valuable tool for law enforcement and, if race is indeed a factor in the seizure calculus, consent might be a substantially less potent tool against African Americans defendants.

Importantly, this Note does not advocate anything as drastic as a blanket ban on consent searches for African Americans or always finding seizure in such cases, it merely argues that the shared and common experiences of police brutality and racial profiling should be considered before the court decides that the defendant voluntarily allowed himself to be seized and searched. Race will become less significant as the police continue to improve their record in equal treatment.

---

[184] *See, e.g.* J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011); Christopher Jackson, J.D.B. v. North Carolina *and the Reasonable Person*, MICH. L. REV. ONLINE 1, 3 (2010).

[185] Cervelli v. Graves, 661 P.2d 1032, 1037 (Wyo. 1983).

VI. CONCLUSION

Race plays a non-trivial role in interactions with police. Police, who are not immune to the effects of implicit and explicit racial biases, often react differently when dealing with minorities. From the gruesome Rodney King beating to the everyday indignities of the New York stop and frisk campaign, African Americans in particular have suffered the effects of these biases. This legacy of violence and disparate treatment has shaped and molded the expectations, fears, and concerns of African Americans in a unique way. If the courts turn a blind eye to the effect that these shared experiences and memories have on a minority's feelings of intimidation when confronted by the police, then it is ignoring a profoundly influential and important trait of the reasonable person.

Social scientists and legal scholars should work to produce a meaningful body of literature that measures the precise role that race might play in an individual's willingness to terminate a voluntary interaction with law enforcement. While some scholars have begun to lay the foundation for thinking about these issues, much work needs to be done. This Note attempts to add to the doctrinal debate by critiquing and analyzing the current literature and providing guidance for future studies. Such studies should also attempt to determine a baseline level of willingness to leave against which race-based studies can be compared. Only by producing such empirical data will scholars enable the courts to properly consult an accurate "reasonable person" standard for all Americans against which they can compare the decisions of other subsets of Americans, especially racial groups.

However, scholarly debate and social science studies are only the beginning of the push for a race-conscious seizure analysis. If future studies show that African Americans, because of their race, are more likely to comply with a policeman's request than the average white person, then advocates should introduce this social science evidence during all trials in which race might have played a factor. Since the value of race in this context is an uncharted territory, advocates for the consideration of race should argue for considerations that are as robust as possible. Moreover, they should focus on highlighting the legacy of violence, discrimination, and oppression that make an African American's interaction with law enforcement unique.

Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA's Potential

Benjamin O. Hoerner

I. INTRODUCTION

On October 29, 2002, President George W. Bush signed into law the Help America Vote Act of 2002—an unprecedented and sweeping piece of federal legislation meant to aid the states in their administration of federal elections.[1] The Help America Vote Act of 2002 ("HAVA") was a reaction to the uncertainty of the state administration of the 2000 presidential election and the subsequent *Bush v. Gore* challenges in the judiciary.[2] In the fog of voter distrust during and following the 2000 election, a spotlight was cast on the unexplored and uneven application of state administration of federal elections. After the election, distrust of the proper administration of elections was at an all-time high, various academic studies speculated about the causes of the problems, and the United State Congress inquired into the myriad of issues that were inherent in the state administration of federal elections.[3] The resulting legislation, HAVA, implemented a series of federal guidelines,

---

[1] Brandon Fail, HAVA's Unintended Consequences: A Lesson for Next Time, 116 YALE L.J. 493, 493 (2006).

[2] *See generally* Gabrielle B. Ruda, Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act, 31 FORDHAM URB. L. J. 235 (2003).

[3] Daniel P. Tokaji, Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act, 73 GEO. WASH. L. REV. 1206, 1210 (2005) [hereinafter Early Returns].

incentives, and requirements, all under the broad umbrella of improving electoral access and integrity.[4]

In spite of HAVA's goals, HAVA has been subject to widespread criticism.[5] One of the primary pillars of HAVA's framework, which provided federal money to state governments that replaced the outdated voting technologies with newer technologies, has been surprisingly contentious.[6] Initially, the technology spending provision was two-pronged: it intended to solve many of the inaccuracies and uncertainties that were raised by voting methods of the 2000 election, but it also was intended to increase the voting accessibility of certain marginalized communities, especially the physically disabled.[7] Although this provision was a seemingly straightforward application of congressional discretionary federal spending, the voting technology incentives have received criticisms that equal the seemingly more contentious Voter ID and provisional ballot provisions of HAVA.[8] Some commentators have even asserted that the provision has failed to address one of the major the problems that motivated the law's enactment—the accuracy of the new technologies.[9] Yet, authors have not limited their critiques to inaccuracy of the new technology's vote recording and have additionally condemned HAVA for failing to definitively address the formal and practical barriers for physically disabled voters at the polling place.[10]

While many voters with mental disabilities retain their right to vote, their accessibility concerns have been fundamentally ignored under the HAVA system.[11] This Note considers the issues surrounding HAVA's enactment and effectiveness, ultimately illuminating its failure to address the voting rights of people with mental disabilities in a manner that parallels its support of the physically disabled.

Given that the rights of people with mental disabilities are the

---

[4] See 52 U.S.C.A. §§ 20901–20906 (West 2014), for HAVA's text. HAVA was codified at 42 U.S.C. §§ 15301–15545 until it was moved to the newly created "Title 52. Voting and Elections" on September 1, 2014. Office of the Law Revision Counsel, *Editorial Reclassification: Title 52, United States Code*, UNITED STATES CODE, http:// http://uscode.house.gov/editorialreclassification/t52/index.html, <http://perma.cc/9PVG-MULH>.

[5] *See* Christina J. Weis, Why the Help America Vote Act Fails to Help Disabled Americans Vote, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 447–55 (2004) (asserting general criticisms of HAVA). *See generally* Fail, supra note 1 (describing HAVA's negative outcomes).

[6] Daniel P. Tokaji, The Paperless Chase: Electronic Voting and Democratic Values, 73 FORDHAM L. REV. 1711, 1734 (2005).

[7] Arlene Kanter & Rebecca Russo, The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852, 852 (2006).

[8] *See* Early Returns, *supra* note 3, at 1215.

[9] *Id.*

[10] Weis, *supra* note 5, at 456.

[11] *Id.* at 446.

central concern of this Note, it is worth briefly defining the contours of the group at the outset of the Note. The term "mental disability" encompasses both cognitive disabilities and mental illness.[12] While cognitive disabilities include any condition that affects mental processes, such as genetic disorders, traumatic brain injuries, or neurological impairments,[13] mental illness and psychiatric disabilities are characterized by changes in thinking, mood, or behavior; people with mental illnesses are generally of normal intelligence.[14] These categories are difficult to use because disabilities are often a swirl of attributes that cannot be cleanly defined.[15] Even intellectual disability, which is considered one of the most significant cognitive disabilities and replaces the term "mental retardation," has a definition that encompasses a spectrum of severity, ranging from mild to profound, with mild individuals often going undiagnosed in society.[16] For the purposes of this Note, the phrase "people with mental disabilities" will cover individuals with intellectual and cognitive disorders as defined by the criteria of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).[17]

This Note is divided into four sections. Part I has served as an introduction. Part II of the Note explores the pre-HAVA voting framework, the basic issues of the 2000 election, the statutory layout of HAVA itself, and the primary critiques that have been levied against HAVA. Part III serves as the heart of the Note, highlighting the need for federal legislative support for people with mental disabilities as well as proffering several ideas for new legislation to amend HAVA to help it fulfill its potential. Finally, Part IV of the Note serves as a conclusion, summarizing the piece's findings as well as contextualizing the United States' options for the future.

---

[12] JOHN PARRY, CIVIL MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 55 (2010).

[13] Sally Balch Hurme & Paul S. Appelbaum, Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters, 38 MCGEORGE L. REV. 931, 932 n.4 (2007).

[14] Dep't of Legislative Servs., Office of Policy Analysis, Barriers to Voting: Individuals under Guardianship for Mental Disability (Nov. 2009), http://dls.state.md.us/data/polanasubare/polanasubare_intmatnpubadm/Barriers-to-Voting-Individuals-under-Guardianship-for-Mental-Disability.pdf, <http://perma.cc/Z9R4-V4LE> [hereinafter Barriers to Voting].

[15] Ryan Kelley, Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees, 30 B.C. THIRD WORLD L.J. 359, 367 (2010) (arguing that mental-disability "categorizations, however, cannot be heavily relied upon because a particular impairment may not fit well within one or the other and, oftentimes, problems occur in tandem").

[16] H. CARL HAYWOOD, Broader Perspectives on Mental Retardation, in WHAT IS MENTAL RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY xvii (Harvey N. Switzky & Stephen Greenspan eds., 2006).

[17] *See generally* THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass'n 5th ed.) (2013).

II. BACKGROUND AND ENACTMENT OF THE HELP AMERICA VOTE ACT

A. Pre-HAVA Statutory Framework

Prior to HAVA's ratification in 2002, the United States Constitution and federal legislation were relatively silent on the state administration of federal elections.[18] The United States Constitution says very little about the administration of federal elections; the Constitution provides simply that:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.[19]

Over time, the Constitution has been interpreted to hand the states the majority of authority in determining their process of electing federal officials.[20]

The states' control of federal elections has not gone without challenge. In addition to the Reconstruction Acts, two significant pieces of federal legislation have imposed some minimal level of federal election uniformity on the states: the 1965 Voting Rights Act (VRA) and its Amendments,[21] which generally sought to combat overt racial discrimination in the voting process[22] and the 1993 enactment of the National Voting Registration Act, which sought to increase registration

---

[18] Largely, state and local officials were in charge of running elections, and there was extremely little oversight or federal law to govern them. *See* Daniel P. Tokaji, Teaching Election Administration, 56 ST. LOUIS U. L.J. 675, 677 (2012) [hereinafter Teaching Election Administration].

[19] U.S. CONST. art. II, § 1.

[20] Cook v. Gralike, 531 U.S. 510, 523 (2001) ("To be sure, the Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections."); but see U.S. CONST. amend XII (stating in elections lacking majority, Congress retains the ability to decide the election "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.").

[21] The Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (codified at 52 U.S.C.A. §§ 10101, 10301, 10501, 10701 (West 2014)).

[22] 52 U.S.C.A § 20501 (West 2014).

and participation among eligible citizens.[23] However, these federal regulations have not been enough.

B. The 2000 Election: Illustrating Gaps in State and Federal Election Law

Despite the varied impact of federal election legislation in the twentieth century, the presidential election of 2000 illuminated the problems that had never been addressed by previous congressional efforts. On the morning of November 8, 2000, the people of the United States awoke to an uncertain future. The outcome of the presidential election between George W. Bush and then-Vice President Al Gore was unclear. Bush was narrowly leading the machine vote tally but Gore was calling for manual recounts of the ballots in four counties.[24] Many eligible citizen-voters were not even certain that their votes had been validly recorded.[25] Eventually, Bush was declared the winner.[26] However, after a series of contested legal decisions in the United States Supreme Court, the legitimacy of that victory was far from unblemished.[27]

In the immediate aftermath, a number of reports scrutinized different aspects of the election's administration, including voting registration practices and the operations of polling places.[28] Nationally, the Census Bureau estimated that over one million voters in the 2000 election did not register votes because of "registration problems."[29] The United States Commission on Civil Rights ("the Commission") found

---

[23] *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 467–68 (2008) [hereinafter *Voter Registration*] (additionally, while the NVRA's provision regulated only congressional elections, it effectively changed the process of registration for all elections because it would be too impractical and inefficient to maintain separate voting lists for state and federal elections).

[24] Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 73–74 (2000).

[25] *See* Sun S. Choy & Peter L. Munk, Beyond Political Rhetoric: The Basics of Voter Identification Laws, FOR DEF., Dec. 2012, at 44 ("The election—in which the deciding state of Florida was decided by just 537 votes out of nearly six million cast—exposed the vulnerabilities of our electoral system and offered a sneak-peek into the possible consequences of a compromised election.").

[26] *See* Joseph Carroll, *Seven out of 10 Americans Accept Bush as Legitimate President*, GALLUP, (July 17, 2001), http://www.gallup.com/poll/4687/seven-americans-accept-bush-legitimate-president.aspx, <http://perma.cc/4ALN-R9YQ>.

[27] Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1069 (2007); *see also* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 73–74 (2000); Bush v. Gore, 531 U.S. 98, 104–05 (2000).

[28] Commentators have additionally noted that voter registration was probably the largest source of lost votes in 2000—accounting, by their estimate, for some one and a half to three million of the four to six million lost votes. See Teaching Election Administration, *supra* note 18, at 678–79.

[29] Gerald M. Feige, *Refining the Vote: Suggested Amendments to the Help America Vote Act's Provisional Balloting Standards*, 110 PENN ST. L. REV. 449, 451 (2005).

that thousands of individuals in Florida, who were disproportionately African American, were excluded from voter registration lists.[30]

C. Congressional Response to the Problems of the 2000 Election: The Help America Vote Act of 2002

One of the largest consequences of the 2000 election was the blow to federal election legitimacy in the eyes of the public.[31] A Gallup poll conducted in the aftermath of the 2000 election "six in 10 Americans had little or no confidence in the nation's vote counting."[32] Another study conducted shortly after the 2000 election found that Americans' confidence in the fairness of elections had dropped by 25%.[33] Recognizing that the issues of the 2000 election created sweeping distrust of the electoral process, Congress was spurred to action.

In the years following *Bush v. Gore*, Congress sharply debated the contours of election reform.[34] Republicans and Democrats knew Congress would draft legislation that would enable an electoral partnership between the federal government and state and local election officials to "make it easier to vote and tougher to cheat";[35] however, there was a noticeable tension over the details of this access-versus-integrity debate.[36] To a large degree, these two themes reflected the competing public concerns: disenfranchisement of eligible voters and the necessity of guarding against fraudulent results.[37] On October 29, 2002, HAVA was enacted, incorporating provisions that addressed both concerns.

In its final form, HAVA contained three pillars of new federal

---

[30] Early Returns, *supra* note 3, at 1209.

[31] *See* Andrew Kohut, *Public Concern About the Vote Count and Uncertainty About Electronic Voting Machines*, PEW RESEARCH CENTER (Nov. 6, 2006), http://pewresearch.org/pubs/87/public-concern-about-the-vote-count-and-uncertainty-about, <http://perma.cc/X5B8-HJHA>.

[32] *See* Jeffrey Zaino & Jeanne Zaino, *Election by Litigation: The Electoral Process Post*-Bush v. Gore, 62 DISP. RESOL. J. 72, 76 (2007).

[33] *Id.*

[34] *See* David Mark, *With Next Election Only a Year Away, Proponents of Ballot Overhaul Focus Their Hopes on 2004*, 59 CONG. Q. WKLY. 2532, 2532 (2001).

[35] *See* 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (discussing need for change in voting system). For a discussion of the steps Congress took in HAVA to inhibit voter fraud, see Ruda, *supra* note 2, at 246–55 (presenting arguments surrounding identification requirements).

[36] *See* Early Returns *supra* note 3, at 1207 (discussing problems with the 2004 presidential election in Ohio). *See also* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 695 (2006) [hereinafter *The New Vote Denial*] (describing additional concern about the how mandatory the congressional reform should be).

[37] *Id.* at 690.

electoral legislation. First, HAVA included a provision that would require certain first time voters to present an identification card.[38] While the topic of voter identification remains controversial, HAVA's requirements were fairly limited. HAVA restricted its application to citizens who registered to vote by mail on or after January 1, 2003, and had not previously voted in a federal election in a state or local jurisdiction.[39] The requirement did not apply to individuals who, at the time they mailed their registration forms, provided a copy of a photo identification, their driver's license number, Social Security Number, or other proof of name and address, such as a government document, utility bill, or bank statement.[40] The voter ID provision was linked to a requirement that all fifty states implement computerized statewide registration lists, which includes the name and registration of all voting citizens within the state.[41] HAVA regulated these state-based lists, and required that each state's chief election official create agreements with the state motor vehicle agency, through which a unique identification number could be "matched" to verify each voter's identity.[42]

HAVA's second major provision, which was tied to the registration list requirement, mandated that all states implement a provisional voting system allowing voters whose names did not appear on registration lists, to complete a ballot with the vote's validity being contingent upon the later determination of the voter's eligibility.[43] In light of the new identification requirements for first time voters, Congress implemented a measure of "fail-safe voting" that ensured that eligible citizens who failed to bring the proper documentation would still be able to cast their votes.[44] While select states had implemented provisional ballots measures before, HAVA required their availability in all states, even requiring that election officials notify individuals of their entitlement to the provisional ballot.[45]

The final major provision of HAVA provided financial incentives for states to implement new voting technologies.[46] After the 2000 election highlighted the difficulties of punch card ballots, butterfly ballots, and pull-lever ballots, HAVA authorized $325 million to be given to the states that swiftly replaced these antiquated technologies.[47]

---

[38] 52 U.S.C.A. § 21083(b) (West 2014).
[39] *The New Vote Denial*, *supra* note 36, at 695.
[40] 52 U.S.C.A. § 21083(b)(2)(A), (d)(2)(B) (West 2014).
[41] *Id.* § 21083(a).
[42] *Id.* § 21083(a)(1)(A)(iii); Early Returns, supra note 3, at 1216.
[43] *Id.* § 21082(a) (West 2014).
[44] *Id.* § 21083(b)(2)(B)
[45] 52 U.S.C.A. § 21082(a)(1).
[46] *Id.* § 20901.
[47] *Id.* § 21041(a).

While HAVA did not prohibit the use of the old technologies, it did place general restrictions on the types of new technologies that had to be purchased to receive federal funds.[48]

Congress wanted to ensure that eligible disabled voters were provided with "the same opportunity for access and participation (including privacy and independence) as for other voters" by providing that funds be allocated to states for "making polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities."[49] Congress also mandated that disabled voters were presented "with information about the accessibility of polling places, including outreach programs to inform the individuals about the availability of accessible polling places and training election officials, poll workers, and election volunteers on how best to promote the access and participation of individuals with disabilities in elections for Federal office" as well as those with "limited proficiency in the English language."[50]

HAVA created the Election Assistance Commission (EAC), the body responsible for overseeing the implementation of HAVA's provisions.[51] Generally, the EAC is not empowered with the "authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government."[52] Yet, aside from the EAC's voluntary guidelines and the basic requirements enumerated above, HAVA delegated most of the details of election reform to state and local officials.[53]

D. Criticisms of HAVA

When President George W. Bush signed HAVA into law on October 29, 2002, he remarked at the event that "[c]itizens of every political viewpoint can be proud of this important law. . . . These measures were carefully considered, and overwhelmingly adopted by the House and Senate. Congress has made a vital contribution to the

---

[48] *Id.* § 21081(a).

[49] *Id.* § 21021.

[50] *Id.* Even before HAVA's enactment, several states took some steps toward election reform, mostly focusing on the promise of technological innovation. *See The New Vote Denial*, *supra* note 36, at 696.

[51] *See* 52 U.S.C.A. § 20921 (West 2014).

[52] *Id.* § 20929.

[53] Early Returns, *supra* note 3, at 1207–08.

democratic process."[54] HAVA was characterized during the congressional debate as "the most important voting rights bill since the passing of the Voting Rights Act in 1965" and as "the most important bill of the 107th Congress."[55] Yet, despite the early showering of accolades, in the years since the HAVA's enactment, one court labeled HAVA as a grouping of "clumsy subsections and clauses."[56] While the flurry of critiques has attacked the law from every conceivable angle, the majority of the critiques are reflective; therefore, the critiques can subsequently be categorized in terms of the failure of the legislation's major provisions.[57]

i. Voter Identification and Registration Lists

Some of the strongest critiques of HAVA have concerned the legislation's inclusion of voter identification and registration lists.[58] Initially, it should be noted that the voter identification requirement of HAVA was relatively limited, only imposing strict demands on first time voters who registered by mail.[59] Commentators have highlighted that this narrow federal demand propelled a wave of more stringent voter identification laws because HAVA was an "indication that Congress believes that photo ID is one method of establishing a voter's qualification to vote. . . ."[60] HAVA left many of the details of the implementation of the ID requirement to the states, which encouraged states to pursue their own identification initiatives.[61] A total of fifteen states required voters to present a government-issued photo ID at the polls to have their votes counted in the November 4, 2014 election.[62]

The strongest indictments of HAVA's ID requirement have honed in on the provision's vague wording, and some have stressed its pointlessness. These critiques have focused on the

---

[54] President George W. Bush, Remarks by the President at Signing of H.R. 3295 (Oct. 29, 2002).

[55] Richard B. Saphire & Paul Moke, *Litigating* Bush v. Gore *in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229, 244 (2006) (quoting Members of Congress during floor debate).

[56] Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1171 (11th Cir. 2008).

[57] *See infra* Part II.D.

[58] *See infra* Part II.D.i.

[59] The limited impositions of HAVA reflected one of the legislation's most contentious provisions during the struggle for its passage. *See* Choy & Munk, *supra* note 25. These registration issues were raised largely by Republican lawmakers who were primarily focused on ensuring the integrity of the elections. *See The New Vote Denial*, *supra* note 36, at 695.

[60] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181,193 (2008).

[61] *See* Choy & Munk, *supra* note 25.

[62] Wendy Underhill, Voter Identification Requirements, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 31, 2014), http://www.ncsl.org/legislatures-elections/elections/voter-Id.aspx, http://perma.cc/ZPQ7-6QJ4 [hereinafter Voter Identification Requirements].

identification provision's failure to actually address the voting registration irregularities that were central to the public's legitimacy concerns of the 2000 election.[63] The matching requirement of HAVA's voter identification provision caused profound misunderstanding in the states. Some local officials denied new registrants' votes when they were not able to match the voter data with information in existing databases.[64]

The voter registration databases mandated by HAVA have also been problematic. Commentators have highlighted the "notoriously unreliable" nature of state databases, which are crucial for voter eligibility.[65] While states regularly purge ineligible voters from states databases, a review of the U.S. Department of Justice's data shows that the purging has actually overcorrected and "overwhelmingly focused on compelling states to prune their registration rolls, rather than on protecting eligible voters from wrongful exclusion."[66]

ii. Provisional Ballots

While the voter identification requirement was meant to buttress the integrity aspect of federal elections, the provisional ballot piece was intended to work as a safeguard against any problematic registration issues.[67] Therefore, individuals, who failed to satisfy the HAVA identification requirement or who were not recognized in the HAVA-mandated state registration database could still cast a vote.[68] For example, in the 2008 election, a study in Indiana found that 1.7% of all provisional ballots cast resulted from the lack of a HAVA-related identification, with only approximately one-third of those ballots

---

[63] *See* Dan Balz, *Carter-Baker Panel to Call for Voting Fixes*, WASH. POST, Sept. 19, 2005, at A3. In the 2004 election, there were still outcries that the final result was blemished with "[d]isputes over the counting of provisional ballots, the accuracy of registration lists, long lines at some polling places, timely administration of absentee ballots and questions about the security of some electronic voting machines." *Id.*

[64] Estelle H. Rogers & Nicole K. Zeitler, *The Voter Registration Gap: Why it Exists and How to Narrow It*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 239, 261–62 (2012).

[65] *Id.* at 261.

[66] *See Voter Registration*, *supra* note 23, at 478. *See also* Cases Raising Claims Under National Voter Registration Act, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/litigation/recent_nvra.php, <http://perma.cc/3WJ8-KSRT> (listing the DOJ's docket during the Bush and Obama administrations and illustrating the impetus to purge registration lists).

[67] MIJIN CHA & LIZ KENNEDY, MILLIONS TO THE POLLS: PROVISIONAL BALLOTING (2014), http://www.demos.org/publication/millions-polls-provisional-balloting, <http://perma.cc/5YFE-EK8R>.

[68] Voter Identification Requirements, *supra* note 62.

counting as valid votes.[69]

iii. Federalism and the Authority of the EAC

Despite HAVA's minimal legislative impositions on the autonomy of the states, a number of federalism issues were raised as a result of the legislation's enactment.[70] The state-based administration of federal elections has often been touted as a necessary guard against federal actors, allowing for decentralized administration to avoid coordinated fraud, to increase flexibility, and to promote local accountability.[71] However, HAVA's federal requirements have led to an increased number of federal statutory claims in federal courts and,[72] as discussed above, a number of states adopted new voter identification, voter registration, and early voting statutes, to mixed results. Additionally, the federally mandated portions of HAVA have created preemption problems in states that have implemented their own voter identification statutes.[73] The United States Election Assistance Commission, created by HAVA and charged with the implementation of the federal election laws, has also been denigrated. Academics have highlighted that "[t]he EAC was designed to have as little regulatory power as possible."[74] Due to the EAC's limited authority to issue binding regulations, many of the disputes concerning voter registration were pushed into federal courts, cluttering already busy dockets.[75]

iv. Voting Technology

One of the most controversial aspects of HAVA was also the least

---

[69] Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 495 (2008).

[70] Daniel Tokaji & Owen Wolfe, *Baker, Bush, and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 977 (2012) [hereinafter *Baker, Bush, and Ballot Boards*].

[71] Note, *Toward A Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2330–33 (2005).

[72] *Baker, Bush, and Ballot Boards*, *supra* note 70, at 970–71 (noting HAVA has not been challenged on federal grounds, likely because the constitutional challenges to the NVRA concretized Congress' authority to regulate voter registration).

[73] Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006).

[74] Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004); 52 U.S.C.A. §§ 20929, 20508(a)(2) (West 2014) (indicating the EAC lacks the power to issue binding regulations regarding HAVA's requirements, but can create rules concerning the NVRA's mail registration procedures, a relatively limited field).

[75] *See Voter Registration*, supra note 23, at 474.

intrusive into the federalism system.[76] The funds that the federal government offered through HAVA to state and local governments for abandoning problematic technology and voting methods that compromised the legitimacy of the 2000 election was plagued with issues of its own.[77] States were required to spend the funds by January 1, 2006, or they would have to repay the federal government.[78] While HAVA permitted the states to use the federal funds to acquire new machines through "purchase, lease, or other arrangement," HAVA's four-year timetable encouraged the practice of purchasing election equipment instead of leasing it.[79] This incentive ran counter to the ultimate objective of HAVA's technology provision, which promoted "low levels of investment and innovation in the market for voting machines" and ensured that "future upgrades occur[ed] only infrequently and at great cost to state and local election agencies."[80] More importantly, the adoption of new voting technology has not consistently mitigated the vote-recording errors that it was intended to stop;[81] elections conducted using HAVA-endorsed equipment have continued to experience inaccurate counts, unreliable performance, and other problems from 2005 through 2011.[82]

E. Accessibility as a Goal of Voting Technology

The technology incentives of HAVA were meant to improve the legitimacy of federal elections through a two-pronged approach: first, to increase the accuracy and reliability of the voting systems and second, to improve accessibility to marginalized voters, such as people with disabilities and people who are non-native English-speakers.[83] While commentators have attacked the technological accuracy and reliability of voter systems,[84] HAVA's mandate was well received.[85] However, HAVA did not explicitly specify that jurisdictions must adopt federal

---

[76] *See* Fail, *supra* note 1, at 493.

[77] *See id.*

[78] *See* UNITED STATES ELECTION ASSISTANCE COMM'N, FREQUENTLY ASKED QUESTIONS REGARDING APPROPRIATE USE OF HAVA FUNDS 17 (2012), *available at*, http://www.eac.gov/assets/1/workflow_staging/Documents/4712.PDF, <http://perma.cc/9L98-J7S8>.

[79] *See* Fail, *supra* note 1, at 494.

[80] *Id.*

[81] *See* 52 U.S.C.A. § 21081 (West 2014).

[82] Candice Hoke, *Voting Technology and the Quest for Trustworthy Elections*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 321, 324–28 (2012).

[83] *See The New Vote Denial*, *supra* note 36, at 696.

[84] *See* Weis, *supra* note 5, at 422–23.

[85] *See id.*; Kanter & Russo, *supra* note 7, at 852–53 (stating that the HAVA mandate exceeds ADA minimum requirements for accessibility).

accessibility standards and, ultimately, there is some degree of consensus that even more could have been done.[86]

i. Physical Accessibility under HAVA

Following the 2000 presidential election, the United States public scrutinized the number of formal and informal impediments to casting an effective vote, including the sheer number of obstructions for eligible voters with physical disabilities.[87] At the time of the 2000 election, although almost every state government had enacted provisions that addressed disabled voter accessibility, each of the states' protections varied in their scope and efficacy.[88] HAVA included three separate sections that were meant to address these divergences in accessibility protection.[89] In Title I, discussed *infra* Part II.C, Congress provided federal grant money for states to upgrade their imperfect voting technology in an attempt to limit the use of punch-hole and pull lever machines that were especially problematic for disabled voters with physical disabilities. Title II demanded that federal payments to states be used to

> mak[e] polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities, including the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.[90]

Title III created broad standards for new voting technologies.[91] HAVA additionally and explicitly maintained the previous federal statutory framework for voting accessibility under the Voting Rights Act, Voter Accessibility for the Elderly and Handicapped Act, National Voter

---

[86] See generally Herbert E. Cihak, The Help America Vote Act: Unmet Expectations?, 29 U. ARK. LITTLE ROCK L. REV. 679 (2007).

[87] *See The New Vote Denial, supra* note 36, at 696.

[88] *See* Report No. GAO-02-107, Voters with Disabilities: Access to Polling Places and Alternative Voting Methods 20–22, U.S. GEN. ACCOUNTING OFFICE (Oct. 2001), http://www.gao.gov/new.items/d02107.pdf, <http://perma.cc/WUW3-E7K4>.

[89] *See* 52 U.S.C.A. §§ 21021(b), 21081(a)(3) (West 2014). *See also* Weis, *supra* note 5, at 443.

[90] 52 U.S.C.A. § 21021(b) (West 2014) (providing for informational access). *See also* Kanter & Russo, *supra* note 7, at 853; GAO Report-09-941, Voters with Disabilities: Additional Monitoring of Polling Places Could Further Improve Accessibility, U.S. GEN. ACCOUNTING OFFICE (September 2009), http://www.gao.gov/assets/300/296294.pdf, http://perma.cc/24HB-8CLU [hereinafter Additional Monitoring].

[91] *See* 52 U.S.C.A. § 21081(a)(3) (West 2014).

Registration Act, and Americans with Disabilities Act.[92] Due to these changes, institutional actors from the disabilities rights and civil rights communities as well as state election officials have praised the legislation as a major piece of civil rights legislation.[93]

Since the passage of HAVA, approximately $350 million combined has been disbursed to 50 states and the District of Columbia to improve equipment, technology, and overall accessibility.[94] A 2008 report by the Government Accountability Office recognized that the promise of HAVA for voters with disabilities had been fulfilled to an extent, citing the "increase in state provisions and reports of practices to improve the accessibility of the voting process" and "a number of reported efforts [have been] taken to improve voting access for people with disabilities," including provisions for voting room accommodations.[95] Moreover, the EAC has continued to support the accessibility of voters by providing guidelines for poll workers to aid voters with disabilities, "encourag[ing] [voters with physical disabilities] to use . . . assistive technology in addition to the accessible voting system" and hiring disabled individuals as poll workers.[96] The EAC has also held a roundtable with the conference's central consideration being how to remove the remaining Election Day impediments to voters with disabilities.[97] Additionally, in 2010, the EAC announced the Accessible Voting Technology Initiative, allotting $7 million to support research of transformative technologies and approaches to facilitating eligible voter accessibility.[98]

ii. Minor and Major Critiques of HAVA's Physical Accessibility Provisions

In spite of the various forms of electoral progress initiated by

---

[92] *Id.* § 21145.

[93] *See, e.g.*, 148 CONG. REC. S10488-02 (daily ed. Oct. 15, 2002) (noting letters from the National Federation of the Blind, Paralyzed Veterans of America, American Foundation for the Blind, NAACP, and National Association of Protection & Advocacy Systems, in support of H.R. 3295).

[94] GAO Report-08-442T, *Elderly Voters: Some Improvements in Voting Accessibility from 2000 to 2004 Elections, but Gaps in Policy Implementation Remain*, 18 U.S. GEN. ACCOUNTING OFFICE (July 31, 2008), http://www.gao.gov/new.items/d08442t.pdf, <http://perma.cc/L7EQ-K4US>.

[95] *Id.*

[96] Election Management Guidelines: Accessibility, UNITED STATES ELECTION ASSISTANCE COMM'N 191 (2010), http://www.eac.gov/assets/1/Documents/EMG%20chapt%2019%20august%2026%202010.pdf, <http://perma.cc/R6XV-64XT>.

[97] EAC Addresses Technology Challenges Facing Voters with Disabilities, UNITED STATES ELECTION ASSISTANCE COMM'N (2010), http://www.eac.gov/eac_addresses_technology_challenges_facing_voters_with_disabilities/, <http://perma.cc/GPM2-FWCU>.

[98] 2010 Accessible Voting Technology, UNITED STATES ELECTION ASSISTANCE COMM'N (2010), http://www.eac.gov/payments_and_grants/2009_accessible_voting_technology_initiative.aspx, <http://perma.cc/NRR7-V88W>.

HAVA, the disabilities rights and civil rights had mixed reactions.[99] The primary critique of HAVA's accessibility provisions has targeted the indefinite nature of some of the legislation's language and requirements, finding them to be unduly vague and, therefore, fundamentally unhelpful.[100] Although HAVA contained references to the blind and visually-impaired, one of HAVA's most obvious statutory omissions was its failure to define "disability" for federal purposes, leading to the possibility of overlooking people with disabilities.[101]

While some have noted that HAVA's language could look to the statutory definitions of the past, these "disability" definitions offer little guidance or support.[102] In HAVA's final provision, the legislation states that it is not intended to restrict or supersede the purposes of the federal legislation that has preceded it.[103] As Arlene Kanter and Rebecca Russo, professors at the Syracuse Center on Human Policy, Law, and Disability Studies, stated, "[I]t seems reasonable that if the plan meets the ADA's accessibility guidelines, it would also comply with HAVA's accessibility requirements."[104] Therefore, the question is raised: did HAVA's undefined terms of accessibility compliance actually change the law at all or was it merely a re-articulation of past standards?

As a result of this lack of clarity and apparent lack of a change in definition, commentators have advocated for a new nationwide definition of "disability" that sweepingly encompasses the spectrum of life differences and difficulties that disabled individuals face in the electoral context.[105] In its enactment, HAVA's vague language reflected a fear that a federally mandated accessibility standard would fail to take into the account the diversity of the fiscal burdens on state financial situations and the logistical impositions on local county administrations.[106] Yet, from the outset of HAVA's consideration, members of the disability rights community cautioned Congress that without minimum standards,

---

[99] Weis, *supra* note 5, at 444. While this critique may be true, it misses the broader point of HAVA's legislative purpose.

[100] *Id.* at 424.

[101] *See* Help America Vote Act of 2001: Hearing on H.R. 3295 Before the H. Comm. on the Judiciary, 107th Cong. 13–15 (2001) (statement of James C. Dickson, Vice President of Governmental Affairs, American Association of People with Disabilities). [hereinafter House Judiciary Hearing]; Weis, *supra* note 5, at 447.

[102] *See* Weis, *supra* note 5, at 448.

[103] 52 § U.S.C.A. 21145 (West 2014).

[104] Kanter & Russo, *supra* note 7, at 854.

[105] *See* Weis, *supra* note 5, at 450 (advocating for the inclusion of the disability rights community in the process of addressing accessibility).

[106] For example, the Registrar of Los Angeles explained that California could not adopt a uniform system due to the variation of requirements between jurisdictions, stating, "one size does not fit all." He cited in his testimony the fact that in Los Angeles County more ballots were cast "than in 41 of the individual States of the United States." Federal Election Practices and Procedures: Hearing Before the S. Comm. on Governmental Affairs, 107th Cong. 97, 94 (2001) (testimony of Conny B. McCormack, Registrar/Recorder of Voters, Los Angeles).

states, lacking guidance, would create "fifty different standards defining access to voting systems and polling places . . . . [while the] manufacturers of voting systems need one clear set of standards to design and build to."[107] By providing minimum standards, HAVA could have maintained a balance between rigid accessibility requirements and some state flexibility, aiming for a low, but significant, bar so that no impossible burden for states was created.[108]

Despite these critiques, HAVA's provisions seem to have had an overall positive impact on the accessibility of elections to individuals with physical disabilities. Between the presidential elections in 2000 and 2008, forty-three states added polling place accessibility standards.[109] In 2010, there was no significant difference in voter turnout between employed people with and without disabilities,[110] there was almost no registration gap,[111] and the overall turnout rate of disabled individuals in the 2010 midterms was only three percent lower than non-disabled individuals.[112]

Yet, while HAVA emphasized physical accessibility and privacy and independence for voters with visual impairments, it contained one major omission: the statute fundamentally failed to address the accessibility concerns of the people with mental disabilities.[113] In limiting its provisions to the rights of the people with physical disabilities, the legislation reflected a long-standing tradition of failing to consider the voting rights of persons with mental disabilities. Academic literature "has traditionally paid little attention to the effect that cognitive disabilities have on citizens' abilities to exercise their voting rights, and efforts to make voting accessible to persons with disabilities have focused almost exclusively on issues of physical accessibility."[114] Below, this gap in the literature is addressed.

---

[107] *See* House Judiciary Hearing, *supra* note 101 (testimony of James C. Dickson, Vice President of Governmental Affairs, American Association of People with Disabilities).

[108] Weis, *supra* note 5, at 451–52 (calling for HAVA funding that matches the original mandate, which would enable state compliance with the legislation's requirements).

[109] Additional Monitoring, *supra* note 90.

[110] Dr. Lisa Schur & Dr. Douglas Kruse, Disability, Voter Turnout, and Polling Place Accessibility, Presentation to the Board of Advisors of United States Election Assistance Commission, June 7, 2011, available at http://www.eac.gov/assets/1/Documents/Rutger's%20-%20Disability,%20Voter%20Turnout,%20and%20Polling%20Place%20Accessibility.pdf, <http://perma.cc/D6LR-9RBV>, slide 8: "Further Breakdowns of Voter Turnout."

[111] *Id.*, slide 10: "Disability Registration Gap."

[112] *Id.*, slide 5: "Estimated Turnout Based on Census Data."

[113] Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1457 (2007).

[114] Nina A. Kohn, *Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections*, 1 CAN. J. OF ELDER L. 29, 30 (2008).

III. DEFINING THE VOTING RIGHTS OF PERSONS WITH MENTAL DISABILITIES: HAVA'S MISSED OPPORTUNITY

At the outset, HAVA's omission of mental disability provisions may seem like an innocuous shortcoming, but a closer inspection of demographic trends reveals that HAVA's failure to include accessibility provisions for persons with mental disabilities was a missed opportunity to anticipate and prevent the need for future legislation. Currently, approximately 30% of voters with mental disabilities actually show up at the polls, representing the lowest voter turnout of all of the major disability groups.[115] Moreover, according to the U.S. Census Bureau, between 2000 and 2030, the number of United States citizens that are sixty-five or older will approximately double from around 35 million to 70 million, when they will account for 20% of the population.[116] However, the effects of societal aging will be more immediate than that; by 2020, the U.S. Census approximates that there will be 54.6 million individuals in the United States that are sixty-five or older, accounting for approximately 16% of the population.[117] This increase in the median age will likely correlate with an increase in the number and percentage of individuals with mental restrictions and disabilities, as 7%–8% of individuals aged 65 and older have severe mental disabilities.[118] While addressing problems of voter eligibility and accessibility, the Legislature should have also addressed the problems associated with the aging of baby boomers years before it will inevitably demand a clearer solution from the federal legislature and judiciary.

A. Voting with a Mental Disability in America

To consider the manner in which HAVA could have addressed the gaps in voting rights for people with mental disabilities, it is crucial to understand the historical relationship between voting rights and citizens with mental disabilities. At the outset, it should be stated that individuals with intellectual and developmental disabilities have been disenfranchised through two distinct methods: first, disenfranchisement

---

[115] Lisa Schur & Meera Adya, *Sidelined or Mainstreamed? Political Participation and Attitudes of People with Disabilities in the United States*, SOC. SCI. Q., July 2012, at 21 [hereinafter *Sidelined*].

[116] WAN HE ET AL., CURRENT POPULATION REPORTS: 65 + IN THE UNITED STATES 12 (2005), http://www.census.gov/prod/2006pubs/p23-209.pdf, <http://perma.cc/8V6V-T9Y7> [hereinafter CURRENT POPULATION REPORTS].

[117] *Id.* at 12–13

[118] *Id.* at 59.

occurs as a result of laws that explicitly deny individuals with mental disabilities the right to vote; second, as with individuals with physical disabilities, there are denials that are implicit in the demands of voting that result from unintended barriers, such as the lack of polling place accommodation.[119] Most historical perspectives of the disenfranchisement of voters with mental disabilities focus on the affirmative and explicit denial of the right to vote.[120]

i. Historical Treatment of Voters with Mental Disabilities in the United States

As with other voting qualifications, discrimination against people with mental disabilities has largely been the prerogative of the states.[121] Beginning in the nineteenth century, there was a wave of state-sponsored discrimination against voters with mental disabilities.[122] Prior to 1820, only two state constitutions included language that disenfranchised individuals with mental disabilities.[123] Yet, by 1880, eleven more states adopted constitutional provisions prohibiting those with some mental disability, however defined, to vote. Many of these were Southern states that wrote these provisions into their constitutions following the Civil War.[124] As new states entered the Union with constitutions that contained disenfranchising language, the existing states continued to amend their constitutions to exclude citizens with disabilities from voting.[125] By 1960, thirty-nine out of the fifty states had provisions in their constitutions that contained exclusionary language.[126]

The history of the disenfranchisement of people with mental disabilities in the United States until 2000 reflects the country's changing attitudes considering individuals with mental disabilities over time.[127] Historically, states seemed to adopt laws to disenfranchise those with mental disabilities for two main reasons.[128] First, those in power,

---

[119] Colker, *supra* note 113, at 1449–51.

[120] *See infra* Section III.A.i.

[121] Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 446 (2000).

[122] KAY SCHRINER & LISA OCHS, "NO RIGHT IS MORE PRECIOUS": VOTING RIGHTS AND PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 3 (2000), http://ici.umn.edu/products/prb/111/111.pdf, <http://perma.cc/3GFG-98XN> [hereinafter NO RIGHT].

[123] *Id.* (explaining that Maine disenfranchised those "under guardianship" and Vermont disenfranchised those that were not "quiet and peaceable").

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] NO RIGHT, *supra* note 122, at 3–4.

[128] *Id.* at 3.

concerned about the integrity of elections, believed that they needed to ensure that voters were morally and intellectually capable of voting.[129] However, while the debate around the intellectual and moral capacity of voters primarily centered around women and African-Americans, it is likely that the states' adoption of disability-centric exclusions was a political consequence of concerns about the persons with mental disabilities' capacity to intelligently, and thus legitimately, vote.[130]

Second, in the nineteenth century, "idiocy" and "insanity" began to be recognized as a social and political concern.[131] In the mid-to-late nineteenth century, United States society viewed "idiocy" and "insanity" with a swirl of contradictory feelings, combining pity, concern, and fear, with societal sympathy reflecting the mentally disabled community's growing visibility in society.[132]

However, since the 1960s, some states have amended their founding documents to abandon, or at least scale back, language that excluded individuals with mental disabilities from voting.[133] In 1974, Kansas amended its constitution, which then prohibited voting by "persons under guardianship, *non compos mentis*, or insane," to only exclude individuals who were diagnosed as mentally ill.[134] Also in 1974, the Louisiana legislature amended its constitution to permit, rather than require, disqualification of "idiots and insane persons" and those under guardianship.[135] Oklahoma removed a clause from its constitution in 1978 that prohibited "any idiot or lunatic" from voting, shifting to exclusively allow its legislature to demark the bounds of voting rights.[136] Finally, and most recently, Idaho dismantled legislation that disenfranchised voters that were "under guardianship, idiotic[,] or insane" in the late 1990s.[137]

While schools for individuals with mental disabilities were developed and legislatures created commissions to advise legislators on disability policy, there was also an increased stigmatization of the group.[138] It is likely that this view of individuals with mental disabilities as "others" affected the policymakers' perceptions as laws were crafted concerning the right to vote.[139] Laws that disenfranchised individuals

---

[129] *Id.*
[130] *Id.*
[131] *Id.* at 4.
[132] NO RIGHT, *supra* note 122, at 4.
[133] *Id.* at 3.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] NO RIGHT, *supra* note 122, at 3.
[138] *Id.*
[139] *Id.* at 4.

who were mentally disabled were justified on the grounds that mentally "incompetent" people could not retain information, weigh details, and make calculated decisions about the vote; the thought was that democracy was just too complicated for their "simple" minds.[140] People believed that individuals with diminished mental capacity did not possess the ability to consent; therefore, their participation in the formation of government was unnecessary.[141] Moreover, legislators likely reasoned that persons with mental disabilities often have guardians whose one vote would protect their own interests, and by proxy, protect the interests of their ward.[142] In this way, the lawmakers reasoned that they could maintain the integrity of elections while not abandoning the interests of those "unfortunate" disabled individuals in the political wilderness.[143]

ii. Statutory and Constitutional Protection of the Voting Rights of Persons with Mental Disabilities

As the twentieth century progressed, some states chose to abandon their constitutional disenfranchisement against individuals with mental disabilities.[144] In 1982, the United States government amended the 1965 Voting Rights Act to allow citizens with disabilities to bring a person of the voter's choice to vote, provided that the choice-individual is not "the voter's employer or agent of that employer or agent of the voter's union."[145] The Voting Accessibility for the Elderly and Handicapped Act of 1984 "guarantee[d] the right to vote in federal elections," but as discussed above, defines persons with disabilities narrowly as only those with a "temporary or permanent physical disability," which was little or no help to those with mental disabilities.[146] However, the ADA requires

---

[140] *See id.* (indicating that there were also concerns about moral integrity of individuals with mental disabilities).

[141] Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 103 (2009). *See also* Kay Schriner, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 DISABILITY STUD. Q. 61 (2002), *available at* http://www.dsq-sds.org/article/viewFile/345/438, <http://perma.cc/ARW8-WWVD> (Some legislators felt that they were sheltering individuals with mental disabilities from the difficulties of political participation, with one delegate at Louisiana's constitutional convention arguing, "[w]hat we seek to do is undertaken in a spirit, not of hostility to any particular men or set of men, but in the belief that the States should see to the protection of the weaker classes.").

[142] *See* NO RIGHT, *supra* note 122, at 4.

[143] *Id.*

[144] *See supra* Section III.A.i.

[145] 52 U.S.C.A. § 10508 (West 2014).

[146] *See* NO RIGHT, *supra* note 122, at 4.

all state and local public institutions make "reasonable modifications to rules, policies, or practices" to avoid disability discrimination in programs, services, and activities.[147]

While the federal laws primarily guard against physical barriers, as opposed to mental barriers, the laws are emblematic of a general federal-policy stance that attempts to include those with disabilities in the electoral process.[148] Yet, this federal trend of protecting people with disabilities runs counter to the overall system of state-based affirmative disenfranchisement of those with mental disabilities.[149] This tension has raised questions of the constitutionality of states excluding individuals with mental disabilities in their state constitutional and statutory provisions.[150]

Generally, courts have determined that the disenfranchisement of individuals with mental disabilities, like other state electoral laws, is an autonomous area for the states.[151] The Supreme Court recognized in *Bush v. Gore* that the right to vote is a fundamental right, albeit conditional, because "'[o]nce the franchise is granted to the electorate,'" a state cannot exclude qualified citizens from participating.[152] Yet, constitutional doctrine is somewhat complex when considering state-based exclusions. A series of Supreme Court cases has held that state statutes that restrict voting access are presumptively unconstitutional, subject to "exacting judicial scrutiny"[153] and only valid if "the exclusions are necessary to promote a compelling state interest."[154] Notably, the Supreme Court has refused to accept laws that restrict the franchise based upon *how* voters make their choices.[155] Therefore, the "mere fact that some citizens labor under cognitive impairments that preclude them from casting their ballots in optimally intelligent ways cannot by itself justify disenfranchisement."[156] Yet, the Court has also noticed that states have a compelling interest to preserve the integrity of its election process and "preserve the basic conception of a political community."[157] Consequently, states have been free to restrict voting rights based on

---

[147] 42 U.S.C. § 12131(2) (2012).

[148] *See* NO RIGHT, *supra* note 122, at 4.

[149] *Id.*

[150] *Id.* at 5.

[151] *See* Hurme & Appelbaum, *supra* note 13, at 931–32.

[152] Bush v. Gore, 531 U.S. 98, 104–05 (2000) (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966)). *See also* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 923–24 (2007).

[153] Kramer v. Union Free Sch. Dist., 395 U.S. 621, 628 (1969). *See also* Dunn v. Blumstein, 405 U.S. 330, 360 (1972); *Harper*, 383 U.S. at 666.

[154] *Kramer*, 395 U.S. at 627.

[155] Carrington v. Rash, 380 U.S. 89, 94 (1965) (citing Schneider v. State, 308 U.S. 147, 161 (1939)).

[156] Karlan, *supra* note 152, at 924.

[157] *Dunn*, 405 U.S. at 344.

other factors.[158] Ultimately, therefore, the constitutional analysis of restrictions on the voting rights of people with mental disabilities will likely consider whether the state restrictions are narrowly tailored to exclude only individuals who lack the capacity to cast a vote that is "meaningful" to them.[159]

While commentators have considered whether some groups of individuals with mental disabilities, namely older voters, could find voting refuge in the Twenty-Sixth Amendment, which expressly prohibits disenfranchisement "on account of age," it is unlikely that the amendment would offer true protection.[160] The Twenty-Sixth Amendment structurally mirrors the Fifteenth Amendment, which prohibits disenfranchisement on the basis of race.[161] Yet, courts have found that the Fifteenth Amendment does not reach facially neutral statutes that lack discriminatory intent but have an adverse impact on certain racial groups.[162] Consequently, because of the structural similarities between the Fifteenth and Twenty-Sixth Amendments, it is likely that courts would similarly interpret the Twenty-Sixth Amendment to only invalidate state statutes that expressly subject elderly citizens to tests that were not applied to younger voters but would not strike down statutes that had an adverse impact on elderly voters, without a finding of discriminatory intent.[163] Additionally, it should be noted that the constitutional right to vote is a negative right, protected only against state interference, and "[i]t provides no additional guarantee of assistance and imposes no duty to assist."[164] Consequently, "to the extent that private acts or omissions are the real barrier[s] to effective participation by cognitively impaired individuals, the Constitution offers little self-executing protection."[165]

---

[158] Karlan, *supra* note 152, at 920.

[159] *See generally* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979). *See also* Karlan, *supra* note 152, at 925–26 ("Once voting is understood to be not only a liberty interest but a fundamental one, courts are likely to insist that any deprivation of the right to vote be accomplished only through procedures that satisfy the three-part procedural due process calculus of Mathews v. Eldridge. Thus, rather than treating the category of mental disabilities as a unitary concept authorizing the disenfranchisement of all individuals who have any degree of disability, courts may well insist that states develop clear procedures for deciding which individuals can be prohibited from voting.").

[160] U.S. CONST. amend. XXVI. *See* Karlan, *supra* note 152, at 926–28.

[161] *See supra* note 160; U.S. CONST. amend. XV.

[162] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (concluding that changing city boundaries to eliminate minority voters is unconstitutional); Lane v. Wilson, 307 U.S. 268 (1939) (holding that an alternative to a "grandfather clause" is invalid under the Fifteenth Amendment because the alternative operated unfairly against the class that the amendment was meant to protect); Guinn v. United States, 238 U.S. 347 (1915) (holding that an Oklahoma grandfather clause was void because it violated the Fifteenth Amendment).

[163] Karlan, *supra* note 152, at 926–27.

[164] *Id.* at 928.

[165] *Id.* at 924.

iii. Barriers to Voters with Mental Disabilities in the Modern Era

The constitutional deference to state autonomy has yielded an awkward result; while federal laws have evolved to provide increasing levels of umbrella support to disabled groups,[166] states have remained relatively staunch in their disenfranchisement of persons with mental disabilities.[167] A limited number of states have mirrored the federal trend by removing constitutional disenfranchisement provisions entirely or making them permissible, rather than mandatory.[168] However, the states have been generally reticent to initiate change.[169] Currently, "[o]nly ten states permit citizens to vote" regardless of their diagnosed mental disability.[170] Comparatively, forty-four of the fifty states have either statutory or constitutional provisions that permit disenfranchisement for mental disability, using terminology such as "idiot," "insane," "lunatic," "mental incompetent," "mentally incapacitated," "unsound mind," and "not quiet and peaceable."[171] Moreover, a majority of states use these categories, which do not reflect the nuance of mental disability, to actively deny people voting rights.[172] As a result, the state-based definitions of mental incompetency are vague and unhelpful,[173] and therefore, are liable to arbitrary and inconsistent application.

Additionally, individuals with mental disabilities have received little federal protection despite the broader trend of protecting marginalized communities—such as individuals with physical disabilities—from state and local intolerance.[174] While the federal government has implemented the ADA, it has also allowed states to

---

[166] *See* The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (2014), http://www.ada.gov/ada_voting/ada_voting_ta.htm, <http://perma.cc/VDH8-G96J>.

[167] See State Laws Affecting the Voting Rights of People with Mental Disabilities, BAZELON CENTER FOR MENTAL HEALTH LAW (2012), http://www.bazelon.org/LinkClick.aspx?fileticket=szZrfSzI8U0%3d&tabid=543, http://perma.cc/92Q6-QJ2Z [hereinafter State Laws].

[168] *See id.*

[169] Colker, *supra* note 113, at 1453–57.

[170] *Id.* at 1451. *See also* Karlan, *supra* note 152, at 930 ("A number of states have enacted various provisions explicitly dealing with voting by individuals in nursing homes and other institutional settings.").

[171] *See* Schriner, *supra* note 121, at 439.

[172] *See also* Hurme & Appelbaum, *supra* note 13, at 957. *See generally* State Laws, *supra* note 167.

[173] *See* Hurme & Applebaum, *supra* note 13, at 941–43 (considering judicial interpretation of the phrases). *See also* FELICITY CALLARD, ET AL., MENTAL ILLNESS, DISCRIMINATION, AND THE LAW: FIGHTING FOR SOCIAL JUSTICE 63–64 (2012) [hereinafter CALLARD].

[174] *See* Schriner, *supra* note 121, at 438–39 (discussing how federal and state laws have been developed to aid access for voters with temporary and permanent disabilities but many state laws continue to restrict the vote for those with mental incapacities).

preserve some discriminatory and disenfranchising laws.[175] Therefore, the broad federal provisions that have included "disability" protections have not protected the voting rights of people with mental disabilities.[176] Seemingly, the federal government has categorized laws that disenfranchise people with mental disabilities as laws that "matter,"[177] with the NVRA even explicitly preserving the right of the states to disenfranchise voters "by reason of criminal conviction or mental incapacity."[178]

Some federal courts have protected the limited voting rights of individuals with mental disabilities. In 2001, prior to the enactment of HAVA, a federal district court in Maine found that a state law that categorically disenfranchised those under guardianship by reason of mental illness violated the Equal Protection Clause because this qualification was an inappropriate measure of the capacity to vote.[179] In *Doe and the Disability Rights Center of Maine v. Rowe*, three women with psychiatric disabilities argued that the probate court, which placed the women under guardianship orders, did not specifically consider their capacity to vote as a distinct part of the guardianship.[180] Although one woman received a modification to her guardianship order that allowed her to vote, another woman's motion to modify her guardianship was denied, and the third had reason to believe her motion would likewise be denied. Because of that, all three women challenged the state's interpretation of its Constitution's "prohibition on voting by persons under guardianship due to mental illness."[181] The federal court initially found that because the probate court failed to ensure "uniformly adequate notice regarding the potential disenfranchising effect of being placed under guardianship," it violated the women's procedural due process.[182] Additionally, the federal court noted that the guardianship order possibly violated the Equal Protection Clause because guardianship for reasons of mental illness "cannot serve as proxy for mental incapacity with regards to voting."[183] Yet, this substantive argument has yet to gain real traction

---

[175] *See id.*

[176] *See id.* (listing federal voting protections—which primarily protect physical disabilities—and contrasting them with state voting qualifications, which frequently use terms like "mentally incapacitated," "unsound mind," and "not quiet and peaceable" to disqualify voters).

[177] *See id.* at 439 (listing state voter qualifications as a type of distinction that Americans tend to uphold in the face of "broad federal antidiscrimination protections such as the ADA").

[178] 52 U.S.C.A. § 20507(a)(3)(B) (West 2014); Schriner, *supra* note 121, at 446.

[179] Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001). *See also* Bindel, *supra* note 141, at 90 ("The status of the right to vote as 'fundamental' used to reliably trigger strict scrutiny for Equal Protection voting rights claims. But in recent years courts have substituted a 'flexible' standard that compares the burdens a law imposes on voters with the state's justifications for the law.").

[180] *Doe*, 156 F. Supp. 2d at 39–40.

[181] *Id.* at 45.

[182] *Id.* at 50.

[183] U.S. CONST. amend. XIV § 1; id. at 55.

because it solely illuminates the necessity of specifically addressing voting rights during guardianship proceedings.[184]

Currently, eighteen states "specifically provide for judicial determination" of an individual's capacity to vote.[185] In 2007, the Eighth Circuit Court of Appeals found that a Missouri law that categorically disenfranchised citizens under court-ordered guardianship due to mental incapacity did not violate the Equal Protection Clause.[186] The court highlighted that the state prohibition was not an absolute ban on people under guardianship because the "Missouri probate courts retained the authority to preserve a ward's right to vote."[187] Consequently, state laws that disenfranchise those under guardianship are allegedly constitutional so long as the guardianship proceedings actively consider these voting rights.

The greatest source of exclusion of voters with mental disabilities does not stem from formal state policies and procedures, but rather is the result of the informal barriers that are implicit in the voting process.[188] Voters with disabilities often require affirmative accommodations to overcome the registration and vote-casting impediments to effectively cast their votes. Stanford University law professor Pamela S. Karlan, writes:

> [Voters with cognitive impairments] may be unable to read or write, and thus may require assistance to understand the ballot and indicate their choices. . . . [T]hey may require additional assistance in getting to the polls or in obtaining and returning absentee ballots. The absence of sufficient affirmative accommodations may preclude their full participation. Therefore, it is quite plausible to hypothesize that more individuals with cognitive impairments are unable to vote because of governmental failures to act than because of explicit disenfranchising policies.[189]

The common problems of "undervoting" and "overvoting" illustrate the unduly complex nature of electoral ballots, and it is likely that these designs have a more significant impact on voters with mental disabilities.[190] Despite these practical barriers, researchers have noted

---

[184] *Doe*, 156 F. Supp. 2d at 50.

[185] Jennifer K. Davis, *Competency and Voters with Psychiatric Disabilities: Considerations for Social Workers*, 39 J. OF SOC. & SOC. W., Sept. 2012, at 51 (2012) [hereinafter Davis].

[186] U.S. CONST. amend. XIV, § 1; Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 812 (8th Cir. 2007).

[187] *Carnahan*, 499 F.3d at 809.

[188] Karlan, *supra* note 152, at 923.

[189] *Id.*

[190] Kohn, *supra* note 114, at 42.

that the types of [assistive technology] that exist currently to address these impairments are somewhat limited."[191]

While researchers have noted that basic technological advancements such as phone-based applications to set reminders and to show when tasks have been completed are helpful, more advanced technology such as a "well-written mobile device app[lication that] might be used to guide [those with mental disabilities] through the process of voting," does not yet exist.[192] The participation of voters with mental disabilities may also depend on the translation of voting language into information that these voters can more readily process, which could be accomplished through technology that converts text to speech or complicated language to more "plain language."[193] As one author has pointed out, there are "no assistive technology products available to the consumers that make this kind of conversion."[194] Consequently, until these types of technological issues are addressed, voters with mental disabilities will continue to struggle to exercise their voting rights.

One of the most practical impediments to voting experienced by individuals with mental disabilities is the reliance on third parties to help them vote. Individuals with mental disabilities often depend upon third-party private actors to help them perform basic life activities; these individuals are often family members or professional caregivers who act as "gatekeepers" to the world.[195] For example, in the event that a progressive state expressly allows citizens with mental disabilities to vote—and provides registration materials, voting assistance, and a physically accessible polling place in which to do so—the voter must still have the ability to travel to the polling place.[196] For elderly individuals and others with mental disabilities, these processes still require the assistance of caregivers. Currently, a person with a disability can receive assistance from another person in the voting booth, but the person assisting the voter "must not mark the ballot if the voter cannot communicate his or her intent."[197] While federal regulations require that long-term care facilities, such as nursing homes, respect residents' voting rights, the federal guidelines provide no "clear guidance on how a facility

---

[191] Greg McGrew, *Assistive Technology for the Voting Process*, THE INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION 8 (2012), http://elections.itif.org/reports/AVTI-002-McGrew-2012.pdf, <http://perma.cc/47JM-N2VA>.

[192] *Id.*

[193] *Id.* at 32.

[194] *Id.*

[195] Karlan, *supra* note 152, at 923.

[196] *Id.*

[197] Cognitive Impairment and Voting, THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, http://www.theconsumervoice.org/sites/default/files/nccnhr/cognitive-impairment-and-voting-fact-sheet.pdf, <http://perma.cc/4SNX-7XSK>.

can fulfill this requirement."[198] This means that if caregivers decline or fail to provide assistance in spite of an individual's request, there is no inviolable or invocable right that the individual with a mental disability can call upon to demand participation in the federal electoral process.[199] For example, surveys of long-term care facilities in Pennsylvania and Virginia suggest that these types of facilities utilize informal screening to decide who has the capacity to vote and who needs help.[200] These informal screenings include quizzing residents on current political office holders or performing informal assessments of mental statuses.[201]

Additionally, research has highlighted the possibility that election officials or others may deny citizens with mental disabilities voting access despite their qualification under state law.[202] A symposium at University of the Pacific McGeorge School of Law, as well as research by the Bazelon Center for Mental Health, have highlighted that election officials can create two possible roadblocks to voting for those with mental disabilities.[203] First, election officials can deny registration or absentee ballots to voters with mental disabilities in a manner not aligned with state law.[204] Second, election officials can turn away individuals with mental disabilities who physically go to the polling place.[205] While neither concern was supported with anecdotal evidence, an article written for the McGeorge Symposium by an election administrator emphasized that administrators may have concerns about whether they should provide an absentee ballot to a family member of a person with mental disabilities, fearing that the individual is not capable of making voting choices and that the family will make the choices for them.[206] The article underscored that without training and preparing election officials for these situations, inappropriate denials of persons with mental disabilities will continue.[207]

---

[198] *Id.*

[199] Karlan, *supra* note 152, at 923. Some researchers have highlighted that in addition to the formal barriers of voting, such as state laws, and the informal barriers, there are additionally "internal" barriers, which include persons with mental disabilities so severe that they may not understand the nature and consequences of the voting process or even have a desire to vote. *See* Kohn, *supra* note 114, at 34–35.

[200] *See* Kohn, *supra* note 114, at 39–40.

[201] *Id.*

[202] Barriers to Voting, *supra* note 14, at 10–11.

[203] *Id.* at 12–13.

[204] Barriers to Voting, *supra* note 14, at 12.

[205] *See* Kohn, *supra* note 114, at 39–40.

[206] *Id.* at 12.

[207] *See id.* at 13.

B. HAVA as a Missed Opportunity and the Future of Voting Rights for Individuals with Mental Disabilities

After examining both the formal and informal barriers that voters with mental disabilities must confront, it appears that HAVA represents a missed opportunity to address the impediments of the present and anticipate the challenges of the future. In 2002, HAVA erected statutory supports for voters with physical disabilities, but this response was purely reactionary. In HAVA, Congress looked backwards at the presidential election of 2000, recognized the accidental disenfranchisement of the physically disabled, and attempted to address this accessibility issue through positive statutory protections. Yet, in the heat of this major policy overhaul, Congress failed to consider the future. In 2011, the American Community Survey sampled approximately 2.9 million citizens and found that 4.9% of non-institutionalized respondents, which included all genders, ages, races, and education levels, reported a mental disability.[208] Data from the National Alliance on Mental Illness found that one in seventeen people live with a serious mental illness.[209] With voters aged sixty-five and older nearly doubling between 2000 and 2030, elderly voters will make up a sizeable demographic of the eligible voter bloc, and the number of individuals with mental disabilities will likely increase as well.[210]

Despite the need for an answer, the mental disability voting rights question remains essentially unaddressed. The heated 2012 presidential election between President Barack Obama and Governor Mitt Romney reanimated the debate as a variety of news sources spotlighted the uncertain status of individuals with mental disabilities.[211] These stories

---

[208] W. Erickson, et al., Disability Statistics from the 2011 American Community Survey, CORNELL UNIVERSITY EMPLOYMENT AND DISABILITY INSTITUTE (Apr. 20, 2013), http://www.disabilitystatistics.org, <http://perma.cc/2MZN-Z2AU> (search "Disability Type" for "Cognitive Disability") (2013).

[209] Kimberly Leonard, *Keeping the 'Mentally Incompetent' From Voting*, THE ATLANTIC, (Oct. 17, 2012, 11:52 AM) http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/, <http://perma.cc/P7VZ-5SF5> [hereinafter Leonard].

[210] *See* CURRENT POPULATION REPORTS, *supra* note 116, at 1.

[211] *See* Shaun Heasley, *Voting Rights Denied to People With Disabilities*, DISABILITY SCOOP (October 23, 2012), http://www.disabilityscoop.com/2012/10/23/voting-denied-disabilities/16712/, <http://perma.cc/HUT3-4AEU>; Jim Grasdale & Jennier Brooks, *Next dispute: Should all the disabled have voting rights?* STARTRIBUNE (July 28, 2012, 7:17 AM), http://www.startribune.com/politics/164098296.html?refer=y, <http://perma.cc/8HJJ-4UWB>; David Scharfengberg, *On Mental Illness and Voting*, THE PROVIDENCE PHOENIX (Oct. 22, 2012, 6:00 PM), http://blog.thephoenix.com/BLOGS/notfornothing/archive/2012/10/22/on-mental-illness-and-voting.aspx, <http://perma.cc/6AAG-YFKH>; Deanna Pan, *Protecting the Voting Rights Of People With Mental Disabilities*, MOTHER JONES (Nov. 5, 2012, 3:01 PM) http://www.motherjones.com/politics/2012/11/voting-rights-mental-disabilities, <http://perma.cc/HEZ8-D8DM>. *See also* Rebecca Schleifer, *Disabled and Disenfranchised*, HUFFINGTON POST (Sept. 5, 2012, 9:00 AM), http://www.huffingtonpost.com/rebecca-schleifer/disabled-voting-

appropriately echoed the polarity of concerns that traditionally have been voiced in the debate about voting rights for individuals with mental disabilities, with some stressing access for individuals with mental disabilities and others emphasizing concerns about integrity and exploitation.[212] For example, an October 2012 article from *The Atlantic* described the concerns of a man diagnosed with fetal alcohol spectrum disorder. The man had skipped voting in the past due to the stigma placed on his condition, but he planned on voting in 2012, resolutely stating, "I do have a voice and I want it to be heard."[213] Also, a video posted to YouTube featured some New Hampshire residents with mental disabilities affirming that they were, in fact, voters.[214]

However, during the election, reports also arose of persons with mental disabilities being "coaxed" into voting. In an account from the 2010 midterms that was redistributed widely before the 2012 election, a voter described seeing "a group of [individuals with mental disabilities] ushered through the voting process by mental health staff, who told some of the group who they should vote for and, in some cases, filled out ballots on their behalf."[215] The onlooker, after watching an election official struggle to take the ballot from one of the individuals with mental disabilities, stated to a news source that "[the individual with mental disabilities] had no idea where he was, let alone that he was voting for future elected offices."[216] A more personal account of the 2012 election described the frustration of two parents, who had taken guardianship of their daughter, Darlene, only to learn that her group home had taken her to vote in the election despite the fact that Darlene had a cognitive-functioning level of a 7-year-old.[217] Her parents stated, "[s]he has never voted. My wife and I became her legal guardians in 1996 to prevent exploitation like this. We were not consulted. She is not capable of making an informed choice, and as her guardians [sic] we would not have approved it."[218]

---

rights_b_1853234.html, <http://perma.cc/9HKW-GXK8>.

[212] *See supra* note 211.

[213] *See* Leonard, *supra* note 209.

[214] The Disabilities Rights Center, Voting and Civic Involvement: Access for People with Cognitive Disabilities (June 3, 2011), http://youtu.be/70Sp7Ul2d1U. Disabilities rights groups also asked all presidential candidates for their positions on a variety of issues, including "How will [you] ensure that people with disabilities have equal access to the vote?"; *See* Presidential Questionnaire, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, http://www.aapd.com/what-we-do/voting/presidential-questionnaire.html, <http://perma.cc/5BNY-D5M2>.

[215] Jana Winter, *Minnesota County Investigating Fraud Allegations Involving Mentally Disabled*, FOX NEWS (Nov. 2, 2010), http://www.foxnews.com/politics/2010/11/02/minn-county-investigating-voter-fraud-allegations-involving-mentally-disabled/, <http://perma.cc/K5UZ-RZZ8>.

[216] *Id.*

[217] Don Carrington, *Group Home Staff Helped Patients Vote*, CAROLINA J. ONLINE (Dec. 3, 2012), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9710, <http://perma.cc/8NAR-J6X9>.

[218] *Id.* One of the additional, yet rarely highlighted, aspects of the debate about voting rights for

These stories, in addition to the more formal uncertainty of the law, highlight the ongoing need for mental disability voting rights reform. They also highlight how the disability protections of HAVA have failed to crystallize the protection, or boundaries, of these voting rights. Recognizing that the voting rates of voters with disabilities in the 2008 and 2010 elections were, respectively, 16.4 and 18.4 percentage points lower than nondisabled individuals, commentators have constantly advocated for greater federal protection for citizens with mental disabilities.[219] Therefore, HAVA represents a missed opportunity to provide federal guidance or impose requirements on states that could guard against the challenges of the future, prior to the inevitable aging of the baby boomer generation. However, despite HAVA's failures of anticipation, it is not too late to create new legislation that mirrors HAVA's spirit while multiplying its impact, by offering clear protection to voters with mental disabilities and determinately solving many of the issues that could exacerbate the federal electoral process in 2016 and beyond.

i. Proposing New Methods to Ameliorate the Practical Barriers to Voters with Mental Disabilities

HAVA could have erected, or at least facilitated, new manners for disabled voters to cast ballots. Now, Congress should look to create an affirmative duty for states to accommodate voters with mental disabilities that retain the franchise. As explained above, many state activities, or lack thereof, act as barriers to voters with mental disabilities even though the measures were not intended as disenfranchising provisions.[220] The Supreme Court has struck down intentionally discriminatory laws but has never held that states are obligated to counteract the effects wealth and other social indicators have on an individual's ability to participate.[221] Therefore, "it is doubtful, at least as a constitutional matter, that a state's failure to modify its election

---

people with mental disabilities is the political affiliation of individuals with mental disabilities. One study has found that 52% of disabled individuals identify as Democrats and 23% as Republicans, which stands in stark contrast to the study's findings from the general population, which identified as 43% Democrat and 39% Republican. At this time, it is unclear whether some of the roadblocks to voting rights for individuals with mental disabilities are simply partisan hesitancy to facilitate votes for the other side of the aisle. *See Study Shows People with Disabilities Less Likely to Vote*, THE CENTER FOR AN ACCESSIBLE SOCIETY, http://www.accessiblesociety.org/topics/voting/votestudy.htm, <http://perma.cc/3L3D-RBB3>.

[219] *Sidelined*, *supra* note 115, at 818. *See generally* NO RIGHT, *supra* note 122, at 5 (citing studies from 1998 and 1999 that found the deficit to be between 14–21 percentage points).

[220] *See supra* note 219; Karlan, *supra* note 152, at 926.

[221] Karlan, *supra* note 152, at 926.

procedures to facilitate voting by persons with cognitive impairments would raise serious constitutional difficulties."[222] If the informal disenfranchisement of voters with mental disabilities is not going to be rectified by the self-initiated actions of the states,[223] federal requirements would be necessary to propel these changes.[224] While some may argue that a version of HAVA that mandated affirmative help to eligible voters with mental disabilities would be an unfair intrusion into state autonomy, ultimately, this requirement would be no more burdensome than the HAVA provisions that have already created state-based help for physically disabled voters.

Additionally, rather than affirmatively imposing a duty on the states to assist voters with mental disabilities, new manners of circumnavigating the informal barriers of voting should be explored. Some academic considerations of these impediments to the mentally and physically disabled have focused on integrationist principles, attempting to remove the barriers to voting at the polling place so that all voters are together, side by side.[225] However, these provisions have proven difficult to implement, and if HAVA instead strove to achieve a form of independent and private voting for disabled individuals, many of the implementation issues could be solved. The promise of this idea is especially clear when we consider it in the context of elderly voters who live in nursing homes and elderly care facilities. Consequently, new legislation could require the states to initiate mobile voting to areas with high concentrations of individuals with mental disabilities.[226] This would be a simple solution, and one that anticipates the challenges of the immediate future.

Additional legislation should be offered to provide funds to investigate the promise of federally mandated requirement for absentee ballots. Currently, the fifty states impose a spectrum of requirements in order to be eligible for an absentee ballot.[227] A uniform standard for

---

[222] *Id.*

[223] *Id.* (stating that "[i]f citizens with cognitive impairments are to receive affirmative assistance from the states, or if private actors are to face any obligation to help them to participate, those duties will have to be imposed by statute"). *See also* Model Letter to State Election Officials, BAZELON CENTER FOR MENTAL HEALTH LAW (Aug. 30, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=KiJrXve39k4%3d&tabid=543, <http://perma.cc/S2J6-PT4P>; *State Laws*, *supra* note 167 (showing that some advocates have supported this by providing form letters to send to institutional actors as well as providing the grounds of legally challenge a state's mental health disenfranchising laws).

[224] Karlan, *supra* note 152, at 926.

[225] Colker, *supra* note 113, at 1415–16.

[226] Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1042 (2007) [hereinafter *Absentee Voting*].

[227] *See* Absentee Ballot Requirements by State, BAZELON CENTER FOR MENTAL HEALTH LAW (Aug. 29, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=83FqwVQSDLM%3d&tabid=543, <http://perma.cc/H8XV-HPBB>.

accessing the absentee ballot, which recognizes and responds to the challenges voters with mental disabilities face, would facilitate the access of those eligible to vote.[228] For example, currently, ten states do not allow voters to obtain absentee ballot applications by telephone and a federal mandate would facilitate access to persons with mental disabilities who simply do not have the capacity to fulfill the mail-request requirements.[229] Similarly, the federal government could revise the manner of absentee ballot casting. Oregon has already begun experimenting with the constraints of submitting absentee ballots to accommodate disabled voters.[230] One of these methods, the "Accessible Ballot Marking System," utilizes a phone-based system for absentee voting while an alternative method is Internet based.[231] The McGeorge School of Law Symposium's formal recommendations advocated for future research on the promise of Internet voting.[232] The recommendation stated:

> [i]n particular the research should consider the specific needs of voters with disabilities, including those with cognitive impairments. The feasibility and cost effectiveness of the following types of programs should be explored: on-site voting assistance, mobile voting assistance (group and individual), HTML and other computer assisted ballot formats, portable voting machines, and ballots with pictures and/or icons.[233]

Several foreign states have already considered the promise of web-based voting as an alternative to traditional voting methods.[234] For example, Norwegian authorities have conducted trials, called E-Vote, on electronic voting, stressing that by utilizing electronic-based solutions, they will increase the democracy of their system through accessibility and participation.[235] States could devise methods, which utilize telephone- and computer-based voting on Election Day[236] that are no more difficult than travelling to public polling places. While these methods may not be currently ready to be implemented in the United States, their promise

---

[228] Additionally, absentee balloting was advocated by the McGeorge School of Symposium as one of its final recommendations. See *Recommendations of the Symposium*, 38 MCGEORGE L. REV. 861, 863–864 (2007) [hereinafter *Recommendations*].

[229] See *Absentee Voting*, *supra* note 226, at 1040.

[230] *Id.*

[231] *Id.* at 1041.

[232] *See Recommendations*, *supra* note 228, at 867.

[233] *Id.* at 863–868.

[234] Kristin Skeid Fuglerud & Till Halbach Rossvoll, *An Evaluation of Web-Based Voting Usability and Accessibility*, UNIVERSAL ACCESS IN THE INFORMATION SOCIETY 1 (Jan. 2011).

[235] *Id.*

[236] *See Absentee Voting*, *supra* note 226, at 1040.

should continue to be emphasized and legislation that specifies incentives for research on Internet voting systems, as opposed to vague technological grants, likely offers the best way forward. Each of the state and foreign-based experiments illustrates a useful way that the federal government could motivate the states, either mandating or incentivizing them to accommodate the disabled through technological advancements aligned with the physical disability considerations of the past.

Although bringing the vote to those with disabilities could increase the overall accessibility, and thus legitimacy, of elections,[237] most opportunities for expanding mental disability access also compromise electoral integrity. For example, while mobile voting may possibly increase overall voter participation, it comes at a cost: the potential for undue influence, ballot tampering, or a reduction in the sense of community or the public visibility of individuals with mental disabilities.[238] More specifically, Internet voting has been attacked as a fantasy:

> [W]ith Internet voting, virtually any reasonably competent and determined hacker (or government or crime syndicate) anywhere in the world can successfully attack the election server. Competent server attacks, such as that on the Board of Elections and Ethics of Washington DC, perpetrated remotely from the University of Michigan during a public test in October 2010, can take complete control of the server and its voted ballots, and quite possibly without detection.[239]

Others have suggested that even the more rudimentary methods of facilitating voting for individuals with mental disabilities are flawed, because even simple methods, such as using candidate photos to assist voters with mental disabilities, may also encourage race-based voting.[240] Despite these risks and concerns of evolving voter accessibility, the promise of responsibly amending HAVA to promote the access of those with mental disabilities outweighs the possible pitfalls. Therefore, so long as practical barriers continue to exist for voters with mental disabilities, federal legislation that incentivizes or mandates progress to ameliorate these concerns is an appropriate federal exercise.

---

[237] Colker, *supra* note 113, at 1478 ("If we bring voting technology to the nursing home rather than expect the residents of the nursing home to travel to the polling place, we might see a significant increase in voting participation rates by some individuals with disabilities.").

[238] Kohn, *supra* note 114, at 50.

[239] Hoke, *supra* note 82, at 349–56.

[240] *Id.*

ii. Proxy Voters: Federal Legislation Suggestions

The simplest solution to the problem of defining the voting capacity of those with mental disabilities would involve new legislation that provides all disenfranchised voters with mental disabilities with surrogates to cast their vote. Previously, states justified the disenfranchisement of individuals with mental disabilities on the grounds that often, a guardian or other person who acts as a caretaker represents their interests.[241] However, this view ultimately obliterates the vote of a person with mental disabilities by simply reducing two votes to one, meaning "[those with mental disabilities] do not count."[242] Martha Nussbaum, a mental disability rights activist, has argued that the logical solution to this problem is that "showing equal respect for the dignity of fellow citizens with cognitive disabilities requires giving them an equal right to vote" through surrogate voters.[243] Nussbaum's approach maintains that a "person's guardian be empowered to exercise the [vote] on that person's behalf and in her interests; just as guardians currently represent people with cognitive disabilities in areas such as property rights and contracts."[244] For Nussbaum, there would be no level of mental disability that would disqualify the eligibility of the surrogacy.[245] Nussbaum's approach has not come without criticism,[246] and ultimately, it would likely represent too large of a legislative leap. However, a federally guaranteed right to guardianship-franchise surrogacy would be a simple solution to a complex problem.

iii. Education About Voter Rights

Other commentators have suggested that new legislation should require the states to implement certain education measures for citizens about voter rights.[247] This measure would be politically feasible because

---

[241] *See* Lisa Montoni Garvin, Guardianship and Caregiver Liability, GPSOLO (Jul.–Aug. 2008), *available at* http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/2008_jul_aug_index.html.

[242] David Wasserman & Jeff McMahan, *Cognitive Surrogacy, Assisted Participation, and Moral Status*, in MEDICINE AND SOCIAL JUSTICE: ESSAYS ON THE DISTRIBUTION OF HEALTH CARE 325, 326 (Rosamond Rhodes, Margaret Battin, Anita Silvers eds., 2012).

[243] *Id.* at 325–26 (quoting Martha Nussbaum).

[244] *Id.*

[245] *See id.*

[246] *Id.* (noting the two main objections highlighted concerns over "consistency" and "coherence").

[247] *See generally* Haley Pero et al., *Voting Laws, Education, and Youth Civic Engagement: A Literature Review* (Ctr. for Info. & Research on Civic Learning & Engagement, Working Paper No. 75, 2012).

it would not limit state autonomy. The United States Elections Assistance Commission (EAC) has already emphasized the importance of outreach strategies in elderly communities that contain especially large proportions of persons with mental disabilities and their caretakers.[248] While some academics have expressed concern that educating caregivers may lead to informal screening of eligible voters and thus disenfranchisement, ultimately a proper education of these individuals would acknowledge the legal reality that the caregiver's role does not include the screening of their wards.[249] Moreover, the information should be uncomplicated in nature, reflecting the needs of voters of all legal cognition levels. Additionally, the education should be two-fold. Not only should local election officials be required to make information both physically and cognitively accessible to those with mental disabilities, local poll workers should also be mandated to review the local laws regarding voting rights for individuals with mental disabilities. In this way, the risk of improper disenfranchisement on election day would be mitigated.[250] While well-intentioned, the institution of a federal education program would have a questionable impact.[251] Therefore, if efforts are going to be utilized, a federal voting rights education program should be low priority, especially if it is considered in the alternative with other legislative solutions.

iv. A Promising Future: Implementation of a Federal of Competency Definition

a. The Contours of a Federal Competency Definition

Ultimately, Congress should enact voting legislation that would create a federal definition of voter competency. This definition would preempt all state disenfranchisement definitions that are inconsistent with its provisions. Commentators and courts have acknowledged that an overly expansive definition would permit individuals with severe mental disabilities to vote, even though they could be fundamentally unaware of

---

[248] U.S. ELECTION ASSISTANCE COMMISSION, QUICK START MANAGEMENT GUIDE ON ELDERLY AND DISABLED VOTERS IN LONG TERM CARE FACILITIES 1, 4–6 (2008), http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/election_assitance.authcheckdam.pdf, <http://perma.cc/5VGJ-JM4M>.

[249] Kohn, *supra* note 114, at 47.

[250] *Recommendations*, *supra* note 228, at 869 (advocating for electoral education for both voters and poll workers).

[251] Kohn, *supra* note 114.

the electoral process in which they are participating, undermining the legitimacy of the vote.[252] Yet, an under-inclusive definition would exclude individuals with psychiatric conditions who possess average levels of cognition. Consequently, the goal of a new legislation would be to strike a careful balance that is respectful of states' desires for integrity while imposing a degree of federal blanket protection to individuals that should have their access to the vote persevered. Initially, it should be noted that the past solutions to this issue are of two distinct types: one categorical and the other functional. Categorical solutions have generally disenfranchised individuals based upon a formal legal label of their circumstance, such as being under a status of guardianship.[253] Comparatively, functional solutions would disenfranchise or, more generally, affirmatively grant the franchise, based upon some type of assessment of the capacity to vote.

Thus far, there have been three primary competency standards proffered. In 1982, the American Bar Association concluded that state-based disenfranchisement laws of the persons with mental disabilities were likely unconstitutional and, instead, advocated for a state-based system that imposed an objective competency test on voters.[254] The text of the ABA's proposal would require that "[a]ny person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote . . . shall be considered a qualified voter of this state."[255] This standard has been utilized by California to determine voter competency and represents the lowest threshold of the major definitions, only requiring the rote memorization of demographic information.[256] This minimal requirement mirrors the definition adopted by other countries, such as the United Kingdom, which simply asks the question: "Are you the person whose name appears on the register of electors[?]"[257] However, the ABA competency test has been criticized because the rigor of its requirement is unaligned with the rigor of the process of voting, namely illustrating a capacity for decision-making.[258]

---

[252] Karlan, *supra* note 152, at 925 (arguing "a practical matter, including within the electorate individuals who do not understand the nature of voting creates a pool of potential votes that might be cast by anyone with the ability to gain access to those individuals' ballots—a species of vote fraud").

[253] Davis, *supra* note 185, at 52–53.

[254] *See generally* Schriner, *supra* note 121. Generally, the constitutional argument against state provisions is rooted in equal protections concerns of the XIV Amendment. The argument maintains that if the laws are subject to strict scrutiny, as restricting a right is a fundamental right, these laws would either fail to meet a compelling state interest or not be narrowly tailored to the interest. *See id.* at 451.

[255] *See* Davis, *supra* note 185, at 57.

[256] *Id.*

[257] *See* CALLARD, *supra* note 173, at 64.

[258] *Id.*

The second primary competency test has responded to this critique, honing in on the alignment between the assessment and the level of cognition required for a meaningful vote. In the past, courts have considered four factors when assessing an individual's capacity for decision-making, two of which are relevant to voting: (1) understanding the process and (2) understanding the effect of the vote.[259] These requirements mirror the considerations of the court in *Doe v. Rowe*, where the court acknowledged that these forms of processes relate to the level of cognition necessary for decision-making.[260] The *Doe v. Rowe* standard has been operationalized through the administration of a verbal test and has been found to be both reliable and quick.[261] Consequently, some commentators, citing the alignment between the level of rigor of the test and the vote itself, have advocated for an adapted test that considers these criteria as the "sensible" solution to the voter competency conundrum.[262] Yet, the operationalization of the test has also been criticized because there is no clear standard for defining what constitutes capacity;[263] although the test is administered and a score is given, there remains vagueness as to what constitutes a "passing"—or the capacity to vote.[264] Additionally, the advocates of this process have not identified the class of individuals who would necessarily have to take the test.[265] Therefore, while the test has been deemed both reliable and quick, administering the test to all eligible voters raises the possibility of high transaction costs when considered in the societal aggregate.

In 2007, a symposium at the University of the Pacific's McGeorge School of Law offered a third possibility, recommending a less burdensome competency definition.[266] The resolution begins by affirming that all states should institute a presumption of capacity to vote to promote the democratic process.[267] State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, "including guardianship and election laws, should explicitly state that the right to vote is retained" except for the individuals who then do not pass the proposed competency standard.[268] The symposium's recommendation then offers a plan that would require an affirmative finding of disenfranchisement through formal process, requiring:

---

[259] *See* Davis, *supra* note 185, at 56.

[260] Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001).

[261] *See* Hurme & Applebaum, *supra* note 13, at 966–69 (acknowledging the promise of the machine in a small scale test of thirty-three Alzheimer's patients).

[262] *Id.* at 970.

[263] *Id.*

[264] *Id.*

[265] *Id.* at 970–72.

[266] *Recommendations*, *supra* note 228, at 863–64.

[267] *Id.* at 861.

[268] *Id.* at 863.

> (1) The exclusion is based on a determination by a court of competent jurisdiction; (2) Appropriate due process protections have been afforded; (3) The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and (4) the findings are established by clear and convincing evidence.[269]

Under the symposium's competency standard, the burden on the individual with mental disabilities is minimal, only requiring that he or she illustrates a desire to participate in the voting process.[270] Yet, as with the ABA's standard, this requirement represents a relatively low bar for voting right eligibility because it does not mirror the level of cognition necessary to understand the effect of the vote.

b. A New Federal Competency Definition

While these three standards are manageable and objective, they have been largely ignored by both the federal government and the states. This inactivity could be the result of many different factors: apathy toward mental disabilities rights; reticence to move away from past standards; or the simple belief that the standards that have been produced thus far for voters with mental disabilities have been fundamentally too relaxed. A new competency standard that addresses some of these concerns, while simultaneously offering some of the advantages of the past competency tests, is the best way to attract attention to the issue and break through the gridlock of state and federal inaction. Therefore, representing an amalgamation of the strengths of past standards, Congress should look to effectuate a standard, which presumes the voting capacity of all individuals, crystallizing the right to vote as a fundamental right and would inextricably incorporate a mix of functional and categorical disenfranchisement tests.

This standard would categorically disqualify all individuals who are under a judicially determined guardianship order. However, it would require the court in all state guardianship proceedings to affirmatively acknowledge to the parties that the guardianship order would mandate the loss of voting rights and, then, the court would inquire whether the parties wanted to preserve the voting rights of an individual who is to be

---

[269] Recommendation Adopted by the House of Delegates, American Bar Association (Aug. 13–14, 2007), http://www.americanbar.org/content/dam/aba/directories/policy/2007_am_121.authcheckdam.pdf, <http://perma.cc/2VDY-SQVJ>.

[270] *Id.*

placed under guardianship, addressing the procedural due process concerns raised in *Doe v. Rowe*.[271] If the parties opt to preserve the voting rights of the individual with mental disabilities, to effectively retain the right, the individual would then have to pass court-administered functional test that mirrors the level of cognitive rigor of voting, namely (1) understanding the process and (2) understanding the effect of the vote.

This standard is advantageous in many ways. Initially, the law would grant all citizens in the United States the right to vote, illuminating the fundamental nature of the right, which the Supreme Court has emphasized.[272] Second, the broad categorical nature of the disenfranchisement removes the fog of uncertainty around many of the state's indefinite requirements of voting incompetency.[273] Third, the standard's recognition of the voting rights of those "under guardianship" who expressly carve out their right to vote is consistent with some of the states' present treatment of disenfranchisement law of the persons with mental disabilities.[274]

The advantage of this is two-fold: if this standard were imposed through a federal law, it would be a minimal imposition because many of the states have already created their own exceptions, and the standard places a large degree of onus of capacity-assessment on the families. Initially, a family-based assessment, at least presumably, addresses the obvious concerns of third-party exploitation of individuals with mental disabilities where guardians are not omnipresent in a disabled individual's life.[275] Yet, by granting the power of the franchise to the guardians, additional fears are raised. Superficially, it appears that caretakers, rather than the states, will be empowered with the decision to grant or restrict the franchise of those put under guardianship. If the standard were to stop here, it would reflect the disadvantage of many states' current laws—which allow a family member's discretion to call into question an individual's voting rights—and fail to safeguard against the level of cognitive integrity that other institutional actors (*i.e.*, the state) demand. Simply put, the love of the guardians for a ward with mental disabilities may cloud a family's judgment, and they may attempt to retain the voting rights of an individual who may not have the level of

---

[271] *Doe*, 156 F. Supp. 2d at 50.

[272] Bush v. Gore, 531 U.S. 98, 104–05 (2000).

[273] However, the phrase "under guardianship" has been interpreted in different ways and, therefore, the standard would additionally need to include a strict definition that includes a court-determined finding of guardianship. *See* Hurme & Applebaum, *supra* note 13, at 943–45.

[274] *See Chart of State Laws on Voter Challenges*, BAZELON CENTER FOR MENTAL HEALTH LAW (Aug. 29, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=cPAQ9Co3ahk%3d&tabid=543, <http://perma.cc/X8RE-3T9U> [hereinafter *State Disenfranchisement Laws*].

[275] *See, e.g.*, Carrington, *supra* note 217.

cognition necessary to vote.

However, in the standard advocated for here, the power of the franchise is not exclusively granted to the families. Once an individual is placed under guardianship, those looking to retain the right to vote would then have to pass a functional test, abating the worries of an overly-inclusive voter competency test; in this way, an individual with a mental or psychiatric disability, who is judicially placed under guardianship but wants to retain the right to vote, can simply pass the functional test and, as a result, retain the right.[276]

Ultimately, new legislation that would guarantee the right to vote and only disqualify individuals as a result of their guardianship status would bring much needed uniformity to the states to combat the country's history of uncertainty about mental disabilities. To a large degree, this standard reflects the Eighth Circuit Court of Appeals' findings in *Missouri Protection and Advocacy Services*, where it acknowledged that categorical disenfranchisement of those under guardianship status was not a unconstitutional infringement on rights so long as there was an initial finding by a court that the individual could—or could not—retain their right to vote.[277] Some have gone further to state that a standard such as the one proffered here is admirable in the manner of assessment and would likely survive a strict scrutiny analysis if utilized by state actors because it solely targets those who do not understand "the nature and effect of voting" and are "incapable of expressing their own electoral preference."[278] Ultimately, academics have highlighted that "separate adjudication of one's capacity to vote within limited guardianship proceedings is a significant advancement in protecting the rights of those with psychiatric disabilities."[279] The standard advocated here forges a middle ground, allowing for the federal government to be a leader in the protection of the voting rights of persons with mental disabilities, promoting their access and participation, while simultaneously protecting the integrity issues that have caused reservations and slowed the advancement of this important evolution.

---

[276] Additionally, a passing score would need to be determined by researchers. However, ultimately, the main weakness of the proffered standard deals with individuals who are never placed under guardianship. While this test ensures that guardians are not granted too much power, by allowing them to place someone under guardianship because they are severely mentally disabled but then inappropriately attempting to retain the individual's right to vote, the question becomes: What happens to those individuals who are never put under guardianship at all, but clearly would not pass a functional test? An additional standard would be necessary for the rare individual, who is uncared for by a ward or guardian and yet is clearly incompetent. Consideration of these relatively rare individuals, who are unlikely to attempt to vote due to informal barriers, should still be considered in future legislation.

[277] *See Carnahan*, 499 F.3d at 808–09.

[278] Bindel, *supra* note 141, at 131.

[279] *See* Davis, *supra* note 185, at 52.

c. A Federal Definition of Mental Disability

Additionally, any new legislation that addresses the rights of individuals with mental disabilities should also offer a definition of "mental disability" with greater statutory clarity. The lacking federal statutory definition of disability impacts those with mental disabilities, perhaps even more so than with physical disabilities, because of the state-based disenfranchisement statutes, utilizing phrases such as "unsound mind," which is especially liable to be administered in an indiscriminate and inconsistent manners.[280] Consequently, the federal government could adopt a uniform definition of mental disability to provide guidance and some level of modernity and substance to the antiquated and vague phraseology utilized by the states. A federal definition of mental disability could utilize the minimum requirements of one of the proposed tests discussed above, or could utilize social science definitions of mental disability.[281] By setting clear demarcation lines, the federal government could compel states to update the electoral statutory definitions to mirror the federal definitions. Here, the new legislation should simply allow the states to utilize the federal definition without mandating state adoption. The attraction of this option is that it would preserve the traditional bounds of state autonomy in the electoral arena while creating a necessary definition to bring uniformity to the state definitions.

V. A HAVA PRIVATE RIGHT OF ACTION

Finally, new legislation should be enacted to explicitly provide disabled individuals who have been denied voting access a private right of action.[282] The enforcement of HAVA has already been scrutinized as

---

[280] *See* Bindel, *supra* note 141, at 93; *see also* Hurme & Applebaum, *supra* note 13, at 940.

[281] *Infra* Section V.C.

[282] *Recommendations*, *supra* note 228, at 862 (stating as the symposium's second preliminary recommendation: "Persons with disabilities who have been denied access to the right to vote privately and independently should have a private right of action under [HAVA.]").

HAVA left undefined the one state actor that would be responsible for HAVA compliance and, subsequently, left unclear whether a voter could seek declaratory or injunctive relief against officers who inadequately carried out their responsibilities under the federal law. While under 52 U.S.C.A. § 21112 (West 2014), HAVA mandates that states create an administrative complaint procedure to remedy citizen grievances, the statute appears to provide no federal remedy and the states have generally considered the federal law's apparent omission of a federal private right of action a determinative victory for the states. *See, e.g.*, 148 CONG. REC. S.10, 412 (daily ed. Oct. 15, 2002) (letter dated Oct. 7, 2002 from the National Conference of State Legislatures to Senators Byrd and

"[t]he most prominent area of election law in which the private-right-of-action question has arisen."[283] Currently, HAVA does not have any express statements that its requirements are privately enforceable and, therefore, it is dubious that Congress intended the private right of action to exist.[284] However, this has not prevented the issue from being litigated in court. The two main decisions that have considered the private enforceability of compliance with HAVA disability access, *Taylor v. Onorato*[285] and *Paralyzed Veterans of America v. McPherson*,[286] both found that the statute was not privately enforceable. By creating new legislation to secure a private right of action, the statute would provide a citizen check on potential partisanship of state and local election officials and the DOJ.[287] While this broad statute would not particularly provide individuals with mental disabilities increased access as compared to individuals with physical disabilities, it would provide an additional enforcement mechanism for all voters with disabilities, and in the instance of mental disabilities, new legislation, it would provide an additional layer of voting right protection.[288]

VI. CONCLUSION

In 2002, the United States Congress seized on the failures of the past to guide them in their plan for the future, passing one of the most sweeping pieces of federal electoral legislation in the country's history. The Help America Vote Act, in many ways, has lived up to its promise, addressing several of the issues illuminated by the struggle of the 2001 election and subsequent *Bush v. Gore* drama. Despite of the criticisms of HAVA, a decade after its enactment, physical accessibility remains at an all-time high, research forges forward, and the outdated voting methods

---

Young, stating that the conference was "satisfied that [HAVA] keeps election administration at the state and local level, limits the role of the U.S. Justice Department to enforcement, [and] does not create a federal private right of action"). *See* Daniel Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 150–51 (2010) (explaining the debate around HAVA"s private right of action) [hereinafter *Public Rights*]. Ultimately, the United States Attorney General has the choice of seeking relief against state or localities but without a private right of action, the citizens' voice in demanding local compliance is essentially muzzled.

[283] *See Public Rights*, *supra* note 237, at 147.

[284] *Id.* at 148.

[285] Taylor v. Onorato, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006).

[286] Paralyzed Veterans of Am. v. McPherson, C06-4670SBA, 2006 WL 3462780, at *6 (N.D. Cal. Nov. 28, 2006).

[287] *Public Rights*, *supra* note 237, at 157.

[288] *See* Weis, *supra* note 5, at 456 (stating that "like prior federal statutes, the HAVA will fail to ensure that states reach a level of full accessibility, the problem is compounded by the lack of a private cause of action to allow disabled voters to seek relief in the federal courts against a delinquent state").

of the past have largely been replaced with new voting technologies advocated by the legislation.

Yet, HAVA has failed in one fundamental respect. The legislation, by looking over its shoulder at the past, has failed to anticipate the follies and traps of the future, primarily the aging of the baby-boomer generation. As the proportion of the population that is 65 years or older incrementally increases, it is likely that proportion of individuals with mental disabilities will also increase. However, both the federal law and state laws have done little to protect this aging population's voting rights, neither erecting formal statutory support nor demanding the destruction of the multitude of informal barriers that inhibit the full exercise of their franchise. Recently, foreign countries have increasingly supported the protection of the individuals with mental disabilities. In 2011, Thomas Hammarberg, a member of the Council of Europe Commissioner for Human Rights, emphasized that people with disabilities, including people with mental health and cognitive disabilities, should have the right to vote regardless of their legal capacity.[289] The United States' neighbor, Canada, is one of four countries (out of the sixty-two countries that were studied) that does not impose any mental capacity requirement on the right to vote.[290] Additionally, Article 25 of the International Covenant on Civil and Political Rights and Article 29 of the Convention on Rights of Persons with Disabilities, signed in 2007, have both highlighted the fundamentality of the right to vote.[291] While many European nations still deny the franchise to citizens with mental disabilities, which is "indicative of the invisibility of people with disabilities within public life," several European nations have recognized the mentally disabled community's fundamental right to vote. Austria,[292] the Netherlands,[293] and the United Kingdom,[294] for example, all enfranchise individuals with mental disabilities.[295]

Foreign support of voting rights for individuals with mental disabilities does not mandate that the United States change its federal election law. However, the recent changes in the international sphere

---

[289] *See* CALLARD, *supra* note 173, at 64–65.

[290] *See* Kohn, *supra* note 114, at 36.

[291] *See Article 29-Participation in political and public life*, UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *available at* http://www.un.org/disabilities/default.asp?id=289.

[292] *See* CALLARD, *supra* note 173, at 65 (highlighting that Article 26(5) of the Austrian Constitution specifies that a person can be deprived of the right to vote only as a result of a criminal conviction).

[293] *See id.* (highlighting that in 2008, the Netherlands amended their Constitution to affirmatively give people with mental health problems and intellectual disabilities the right to vote).

[294] *See id.* (explaining that "The Electoral Administration Act 2006 abolished the common law rule that a person lacks legal capacity to vote by reason of mental health problems" and that psychiatric inpatients have retained the right to vote).

[295] *Id.* ("Although this right has not always been well exercised, "only 10% of inpatients in Germany have used their right.").

further support the idea that the United States should abandon the past and consider adopting new voting standards that anticipate the challenges of the future. Over the course of the past forty years, mental disability law in the United States has undergone a "revolution," and "[t]his revolution continues today, and there is no reason to expect any abatement in case law, statutory amendments, or advocacy initiatives in the coming years.[296] Currently, another federal "revolution" specific to mental disability voting rights is an unnecessarily extreme move. Many states have already responded to the changing tides of disability considerations initiated by the disability rights movement and began to reflect a more progressive mindset in their mental disability disenfranchisement laws. Federal leadership, however, may be necessary to motivate the number of states that are more apathetic, or hesitant, to respond to the incremental evolution of mental disability voting rights, pushing the states to consider a new uniform standard for competency that abandons the antiquated, and over-wrought, definitions and considerations of the past. When HAVA was created, it was largely crafted as a backwards-looking piece of legislation, acting as a knee-jerk reaction to the problems raised by the controversy of 2000 presidential election. In doing so, the legislation limited the scope of its potential and capacity to initiate change. Now, over a decade after its enactment, the missed opportunities of HAVA represent the possibility of new legislation, which could anticipate and minimize the challenges of the future and fulfill the legislation's promise by finally bringing the rights of persons with mental disabilities into parity with voting rights protections of other marginalized groups.

---

[296] MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 45–46 (2012) (noting that there was the creation of a "patients' bar" for legal representation, among other state based changes).

Article

City of Los Angeles v. Patel: The Upcoming Supreme Court Case No One Is Talking About

Adam Lamparello[1]

I. INTRODUCTION

The United States Supreme Court recently granted certiorari in *City of Los Angeles v. Patel*[2] to consider whether §41.49 of the Los Angeles Municipal Code violates the Fourth Amendment. Section 41.49 permits law enforcement to conduct warrantless and suspicionless inspections of a hotel owner's guest registry without judicial oversight. A guest registry includes:

---

[1] Assistant Professor of Law, Indiana Tech Law School.
[2] 738 F.3d 1058 (9th Cir. 2013).

> The guest's name and address; the number of people in the guest's party; the make, model, and license plate number of the guest's vehicle if the vehicle will be parked on hotel property; the guest's date and time of arrival and scheduled date of departure; the room number assigned to the guest; the rate charged and the amount collected for the room; and the method of payment.[3]

The Ninth Circuit Court of Appeals correctly held that hotel owners have a reasonable expectation of privacy in their guest registries, and that the lack of judicial oversight could lead to unreasonable infringements on the privacy rights of hotel owners.[4]

But the Ninth Circuit erred when it held that hotel *guests* have no expectation of privacy in the guest registries. The Ninth Circuit based this part of its holding on the third-party doctrine, which states that individuals forfeit privacy protections when they voluntarily submit information to a third party.[5] Federal and state courts are split regarding the continued viability of the third-party doctrine, particularly in an era when technological advances have allowed law enforcement and government officials to track a suspect's location with a GPS device, collect cell phone metadata, and monitor an individual's Google search history, all without a warrant.

This Article argues that the Supreme Court should reject or at least modify the third-party doctrine in *Patel* to reflect threats to privacy posed in the digital era. The Ninth Circuit in *Patel* did not.[6] The Court's holding may have profound implications on the constitutionality of the government's surveillance programs, including its ability to collect cell phone metadata without a warrant or probable cause.[7] Simply put, the constitutionality of section 41.49 can—and should—lead to a principled and much needed shift in favor of stronger privacy protections.

The problem with the third-party doctrine, particularly in the digital era when the line between public and private space is collapsing,

---

[3] *Id.* at 1062.

[4] *Id.* at 1065.

[5] *See, e.g.*, United States v. Miller, 425 U.S. 435, 443 (1976) (holding that individuals have no reasonable expectation of privacy in financial records given to a bank teller); Smith v. Maryland, 442 U.S. 735, 742 (1979) (holding that an individual has no reasonable expectation of privacy in outgoing calls made from a private residence).

[6] 738 F.3d at 1064; *see also* Sherry F. Colby, *Third-Party Searches*, DORF ON LAW (Nov. 12, 2014), http://www.dorfonlaw.org/2014/11/third-party-searches.html, <http://perma.cc/4W29-C489> (discussing the *Patel* case and stating that the third-party doctrine should be reconsidered).

[7] The government's metadata collection program tracks outgoing calls from cell phones, but does not typically record the subscriber's name, address, or other identifying information, which can be accessed only by a showing of reasonable suspicion that the caller is associated with a terrorist group or engaged in criminal conduct. *See* ACLU v. Clapper, 959 F. Supp. 2d 924, 951 (E.D.N.Y. 2013) (stating that "when [the Government] makes a query, it only learns the telephony metadata of the telephone numbers within three "hops" of the "seed." Third, without resort to additional techniques, the Government does not know who any of the telephone numbers belong to. In other words, all the Government sees is that telephone number A called telephone number B.").

is that once an individual voluntarily conveys data to a third party, he or she surrenders *all* privacy protections in that data, regardless of who accesses the data, and irrespective of the purpose for which that access is given. In the pre-digital era, this ordinarily meant that when an individual provided a bank teller with confidential financial information, the individual waived any privacy rights in that information with respect to employees at the bank or government officials who were conducting a criminal or regulatory investigation.[8]

In the digital era, the third-party doctrine means something different, because the scope of the privacy waiver is far more significant. Outgoing cell phone calls can be tracked at any time—without a warrant or any suspicion of wrongdoing—by the government through the subscriber's carrier. Likewise, an individual's search history on Google is subject to monitoring by the government.[9] Thus, the sheer volume of information that the government can uncover in connection with its wide-ranging surveillance program casts doubt on the principle that citizens should lose *all* privacy rights in information merely because they sign a contract with a cell phone service provider or decide to conduct online research.

Admittedly, the administrative search exception to the Fourth Amendment is a well-settled doctrine that allows state and government officials to conduct warrantless searches of records that employers in highly regulated industries are required by law to maintain.[10] This exception is intended to give law enforcement sufficient latitude to ensure that businesses serving the general public, such as restaurants and health care facilities, comply with health and safety codes.[11] When law enforcement searches a hotel guest registry, or when the government tracks cell phone metadata, the purpose is to search for evidence of criminal and terroristic activity, which in most cases requires individualized suspicion. Moreover, these searches are often conducted in a broad and indiscriminate manner. To make matters even worse, they typically reveal the names, location, outgoing call logs, and internet

---

[8] *See Miller*, 425 U.S. at 442–43 (noting that the expressed purpose of the Bank Secrecy Act is to require records to be maintained because they "have a high degree of usefulness in criminal tax, and regulatory investigations and proceedings") (quoting 12 U.S.C. §1829b(a)(1)); *see also* Klayman v. Obama, 957 F. Supp. 2d 1, 33 (D.D.C. 2013) ("The Supreme Court itself has long-recognized a meaningful difference between cases in which a third party collects information and then turns it over to law enforcement, and cases in which the government and the third party create a formalized policy under which the service provider collects information for law enforcement purposes.") (citing *Ferguson v. Charleston,* 532 U.S. 67 (2001).

[9] *See* Catilin Dewey, *The NSA May Be Reading Your Searches But Your Local Police Probably Aren't,* WASH. POST, Aug. 3, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/03/the-nsa-might-be-reading-your-searches-but-your-local-police-probably-arent/, <http://perma.cc/G6XF-4NRS>.

[10] *Fourth Amendment—Administrative Searches and Seizures*, 69 J. CRIM. L. & CRIMINOLOGY 552, 553 (1978).

[11] *Id.*

search history of unsuspecting citizens.[12] Together, the third-party doctrine and administrative search exception can easily become a one-two punch that strikes a significant blow at the heart of basic privacy protections.

This is not to say that the third-party doctrine should be abandoned entirely, or that the voluntary disclosure of data to third parties has no legal significance. Rather, it is to say that there should be limits on the type of information third parties can access, the circumstances in which third parties can monitor data that would otherwise be private, and the level of suspicion required before companies such as Verizon or AT&T must surrender their subscribers' call histories, among other things.

After all, limits on the third-party doctrine exist in a variety of contexts. For example, when an individual walks into her neighborhood pharmacy and gives the pharmacist a prescription, the law regulates the circumstances in which the prescription information may be disclosed to third parties.[13] Although state and government officials are permitted by law to inspect a pharmacy's records, including its history of dispensing controlled substances, the purpose of the inspection provisions is to ensure compliance with applicable laws that are designed to prevent prescription drug abuse.[14] Given the documented history of such abuse in the United States and the failure of some pharmacies to comply with federal law, these disclosures further the state's interest in protecting the health and safety of its citizens. Furthermore, warrantless searches of these records are typically limited to circumstances where the government's purpose is to "identify or locate a suspect, fugitive, witness, or missing person,"[15] when a crime is committed on the premises, or when there is a "medical emergency in connection with a crime."[16] Simply put, these laws do not allow government officials to go on a fishing expedition.

On the other hand, indiscriminately collecting metadata, monitoring internet search history, or sifting through hotel guest registries can be just that—a fishing expedition. The government's commonly articulated purpose for collecting such information—national security—is certainly valid, but it should not countenance a government dragnet that delves into the lives of millions of citizens for the sole purpose of finding a few

---

[12] *See* Dewey, *supra* note 9.

[13] *See generally* Sherry L. Green, HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPPA) PRIVACY RULE AND PRESCRIPTION DRUG MONITORING PROGRAMS (PMPS) (Nat'l Alliance for Model State Drug Laws 2010), http://www.namsdl.org/library/80E22BDA-19B9-E1C5-319D10D2D8989B6C/, <http://perma.cc/G3YS-YJVA> (discussing the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and explaining the circumstances when disclosure is mandated by law).

[14] *Id.*

[15] *See FAQ on Government Access to Medical Records*, AMERICAN CIVIL LIBERTIES UNION (May 30, 2003), https://www.aclu.org/technology-and-liberty/faq-government-access-medical-records, <https://perma.cc/9CNR-XJ33> (discussing 45 C.F.R. § 164.512(f)(2002)).

[16] *Id.*

bad apples. The Fourth Amendment's particularity requirement exists for a reason: to prevent the "reviled 'general warrants' and 'writs of assistance' of the colonial era."[17] This is precisely why the third-party doctrine, as currently applied by the courts, is ill-suited to the digital era: it provides law enforcement with almost limitless authority to monitor citizens' private lives, including where we travel, who we call, and what we search for on the internet. Indeed, the scope of the third-party doctrine in the digital age is the issue lurking underneath the surface in *Patel*—and it has the potential to affect privacy rights in a variety of contexts.

Even if the Supreme Court wants to sidestep the third-party doctrine in *Patel*, it will, at the very least, indirectly confront the issue; the Ninth Circuit expressly stated that the doctrine was still valid law.[18] Thus, if the Court's holding is narrow and confined to the hotel owner's expectation of privacy in a guest registry, one can assume that the third-party doctrine remains good law in its current form. If the Court confronts the third-party doctrine directly, the Justices will have the power to strengthen privacy protections by establishing principled limits on the warrantless collection of information, such as cell phone metadata. Conversely, the Court's decision has the potential to place law enforcement's investigatory powers—and the government's interest in national security—above privacy rights. This would lead to a weakening of the Fourth Amendment.

Put bluntly, *Patel* is the case no one is talking about, but the case may—and likely will—affect every citizen, including any Justice of the Supreme Court who decides to stay at a hotel in Los Angeles or call a loved one from a cell phone. After all, if the Court reverses the Ninth Circuit, thereby permitting law enforcement officers to enter hotels and discover the names of hotel guests, their room numbers, their license plate numbers, and the duration of their stay, then the government will almost certainly be permitted to track the outgoing calls from a smartphone.

This Article argues that the Court should partially affirm the Ninth Circuit's decision, which would invalidate section 41.49 on Fourth Amendment grounds,[19] but reverse the portion of its decision reaffirming the third-party doctrine. Specifically, the Court should modify the third-party doctrine by adopting the standard suggested by Justice Alito in

---

[17] *Riley*, 134 S. Ct. at 2492.

[18] *See Patel*, 738 F.3d at 1062 ("To be sure, the *guests* lack any privacy interest of their own in the hotel's records.").

[19] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). As discussed below, over the years the Court has created numerous exceptions to the warrant and probable cause requirements, thus making it easier for law enforcement to conduct searches and seizures.

United States v. Jones,[20] which asks whether a particular search exceeds society's expectations for how the police would investigate a specific crime.[21] In doing so, the Court should hold, as it did in *Jones* and *Riley v. California*,[22] that factors such as the length and intrusiveness of the search, the quality and quantity of data collected, and the level of suspicion required are all relevant to the societal expectation of privacy.

This approach would not require the Court to overrule *Smith v. Maryland*[23] and *United States v. Miller*,[24] which reaffirmed the third-party doctrine. However, it would import much needed limitations in situations where individuals voluntarily convey information to a third party without the expectation that this disclosure will entitle anyone to access and monitor such information. As it stands now, law enforcement officers can enter a hotel lobby and demand to see the names, room numbers, and license plate numbers of every guest staying at the establishment. They can also seek out information regarding when each guest checked in, when they intended to leave, and the people who were staying with them. This makes the Fourth Amendment—and by extension, privacy rights—seem like little more than an aspirational and unenforced principle. The relationship between citizens and their civil liberties should not be so strained.

Part II of this Article surveys case law, analyzing the constitutionality of the government's metadata collection program and highlighting two recent decisions that arrived at opposite conclusions. In *Klayman v. Obama*,[25] the United States District Court for the District of Columbia invalidated the government's metadata collection program on Fourth Amendment grounds, holding that the third-party doctrine was ill-suited to the digital age.[26] In *ACLU v. Clapper*,[27] the United States District Court for the Southern District of New York reached the opposite result, applying the third-party doctrine to hold that citizens waive any expectation of privacy with respect to information that is voluntarily shared with a third party.[28] These cases, as well as others decided at the state and federal level, reveal deep divisions within the courts that concern the balance between privacy rights and the need to afford the government sufficient flexibility in adopting measures that will prevent acts of terrorism.

Part III analyzes *Patel*, and argues that it provides the Court with an

---

[20] 132 S. Ct. 945 (2012) (holding that the use of a GPS tracking device to monitor a suspect's whereabouts for twenty-eight days violated the Fourth Amendment).

[21] *See id.* at 964 (Alito, J., concurring).

[22] 134 S. Ct. 2473 (2014) (holding that, in the absence of exigent circumstances, law enforcement officers may not search an arrestee's cell phone without a warrant and probable cause).

[23] 442 U.S. 735 (1979).

[24] 425 U.S. 435 (1976).

[25] 957 F. Supp. 2d 1 (D.D.C. 2013).

[26] *Id.* at 37.

[27] 959 F. Supp. 2d 724 (E.D.N.Y. 2014).

[28] *Id.* at 751.

ideal opportunity in which to modify the third-party doctrine to account for the serious threats to privacy posed in the digital era. In addition, Part III sets forth a workable framework within which to protect privacy rights, while giving law enforcement and the Government sufficient flexibility to investigate criminal behavior.

II. A SPLIT AT THE FEDERAL LEVEL

At the federal level, courts are split regarding the continued viability of the third-party doctrine and whether the government's metadata collection program is constitutional. In *Klayman*, for example, the district court held that the NSA's metadata collection program constituted a search under the Fourth Amendment.[29] In doing so, the district court refused to apply *Smith*, emphasizing the differences between pen registers and metadata.[30] In *Clapper*, however, the Eastern District of New York reached the opposite result, applying *Smith*, and held that citizens have no reasonable expectation of privacy in the numbers dialed from a cell phone.[31] *Klayman* and *Clapper* underscore the divergent views that exist among federal courts, the confusion that *Smith* has created among the lower courts, and the need for the Supreme Court to intervene and provide doctrinal guidance.

In *Klayman*, the United States District Court for the District of Columbia held that the National Security Agency's ("NSA") surveillance program, which consisted of the indiscriminate, suspicionless collection of cell phone metadata, likely constituted a search under the Fourth Amendment.[32] The court rejected the rationale in *Smith*, stating that "citizens' phone habits"[33] have become "thoroughly unlike those considered by the Supreme Court thirty-four years ago [in *Smith*]."[34] Indeed, the government's "almost-Orwellian technology"[35] was "unlike anything that could have been conceived in 1979,"[36] when *Smith* was decided. That is precisely the point. Times have changed, and so must the courts. As explained below, *Klayman* embraced a view of privacy—

---

[29] *Klayman*, 957 F. Supp. 2d at 36–37.

[30] *Id.* at 37.

[31] *See Clapper*, 959 F. Supp. 2d at 752.

[32] *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN, June 5, 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order, <http://perma.cc/DF7J-2KXT>. The public became aware of the NSA program from leaks of classified material by Edward Snowden, a former employee of the NSA. Initial media reports suggested that, on April 15, 2013, the Foreign Intelligence Surveillance Court (FISC) issued an order, dated April 25, 2013, ordering Verizon Business Services to produce to the NSA all call detail records for telephone metadata.

[33] *Klayman*, 975 F. Supp. 2d at 31.

[34] *Id.*

[35] *Id.* at 33.

[36] *Id.*

and particularity under the Fourth Amendment—that the pre-digital age precedent could not have foreseen, and that the Supreme Court should adopt.

The court in *Klayman* reasoned that, because "people in 2013 have an entirely different relationship with phones than they did thirty-four years ago,"[37] the Government's "metadata collection and analysis almost certainly does violate a reasonable expectation of privacy."[38] The court rejected the government's argument that *Smith* "squarely control[s]"[39] cell phone searches. In *Smith*, the Court held that law enforcement could install a pen register to track the numbers dialed from a suspect's phone.[40] There was no reasonable expectation of privacy in the dialed numbers because they were "voluntarily transmitted . . . to his phone company"[41] and because "it is generally known that phone companies keep such information in their business records."[42]

The collection of cell phone metadata, however, involves novel issues that could not have been contemplated by courts decades ago. To begin with, the government's surveillance capabilities, coupled with "citizens' phone habits, and the relationship between the NSA and telecom companies,"[43] have become "unlike those considered by the Supreme Court thirty-four years ago [in *Smith*]."[44] Put differently, "the Court in *Smith* was not confronted with the NSA's Bulk Telephony Metadata program,"[45] and could not "have ever imagined [in 1979] how the citizens of 2013 would interact with their phones."[46]

For example, unlike a pen register, which was "operational for only a matter of days," the "NSA telephony metadata program . . . involves the creation and maintenance of a historical database for *five years'* worth of data."[47] Furthermore, in *Smith*, law enforcement installed a pen register to "record the numbers dialed from the [suspect's] telephone,"[48] whereas the NSA program collects "*on a daily basis* [from telecommunications service providers] electronic copies of call detail records, or telephony metadata."[49] In other words, *Smith* involved the targeting of an individual suspect, which "in no way resembles the daily, all-encompassing, indiscriminate dump of phone metadata that the NSA

---

[37] *Id.* at 36.
[38] *Id.* at 32.
[39] *Klayman*, 975 F. Supp. 2d at 30 (internal quotation marks omitted).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 31.
[44] *Id.*
[45] *Klayman*, 975 F. Supp. 2d at 32.
[46] *Id.*
[47] *Id.* (emphasis in original).
[48] *Id.*
[49] *Id.* (internal quotation marks omitted) (emphasis in original).

now receives as part of its . . . Metadata Program."[50] As the court explained, it is "one thing to say that people expect phone companies to occasionally provide information to law enforcement"[51] but "quite another to suggest that our citizens expect all phone companies to operate . . . a joint intelligence gathering operation with the government."[52]

To be sure, the "almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979."[53] As the court recognized, "[t]he notion that the Government could collect similar data on hundreds of millions of people . . . for a five-year period . . . was at best, in 1979, the stuff of science fiction."[54] To make matters worse, the government uses "the most advanced twenty-first century tools,"[55] to "proceed surreptitiously,"[56] thus circumventing the "ordinary checks that constrain abusive law enforcement practices."[57]

Lastly, "not only is the Government's ability to collect, store, and analyze phone data greater now than it was in 1979, but the nature and quantity of the information contained in . . . metadata is much greater."[58] The court held as follows:

> Cell phones have also morphed into multi-purpose devices. They are now maps and music players . . . . They are cameras . . . . They are even lighters that people hold up at rock concerts . . . . They are ubiquitous as well. Count the phones at the bus stop, in a restaurant, or around the table at a work meeting or any given occasion. Thirty-four years ago [when *Smith* was decided], *none* of those phones would have been there . . . . [Instead], city streets were lined with pay phones . . . when people wanted to send "text messages," they wrote letters and attached postage stamps.[59]

Of course, while metadata itself has not changed over time,[60] it can, unlike thirty-four years ago, "reveal the user's location."[61]

Also, the "ubiquity of [cell] phones has dramatically altered the

---

[50] *Klayman*, 975 F. Supp. 2d at 33.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Klayman*, 975 F. Supp. 2d at 33 (internal citation omitted).
[57] *Id.*
[58] *Id.* at 33–34.
[59] *Id.* at 34–35 (internal citations omitted).
[60] *Id.* at 35.
[61] *Id.* at 35 n.57.

quantity of information that is now available and . . . what the information can tell the Government about people's lives."[62] For example, people "send text messages now that they would not (really *could not*) have made or sent back when *Smith* was decided."[63] In fact, text messaging has become "so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."[64] This reflects a "rapid and monumental shift towards a cell-phone-centric culture,"[65] in which metadata from each person's phone reveals "a wealth of detail about her familial, political, professional, religious, and sexual associations."[66] As the Supreme Court held in *City of Ontario v. Quon*,[67] this "might strengthen the case for an expectation of privacy."[68] That expectation is compromised when "the Government, without any basis whatsoever to suspect them of any wrongdoing, collects and stores for five years their telephony metadata for purposes of subjecting it to high-tech querying and analysis without case-by-case judicial approval."[69]

Klayman's analysis is significant in several respects. First, the individual's expectation of privacy was predicated on the scope, breadth, and duration of the government's intrusion, not whether the place itself was public or private, or whether the information was sufficiently personal to establish an objective expectation of privacy. In *Jones*, the Supreme Court adopted a similar view, holding that law enforcement's use of a "GPS device to track a suspect's movement for nearly a month violated Jones's reasonable expectation of privacy."[70] The *Jones* Court explained that, while "relatively short-term monitoring of a person's movements on public streets"[71] is permissible, "the use of longer-term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[72] Although, in *United States v. Maynard*,[73] the District of Columbia Circuit held that, while a person "traveling in an automobile on public thoroughfares has no reasonable expectation of

---

[62] *Klayman*, 957 F. Supp. 2d at 35–36 (emphasis in original).

[63] *Id.* at 36 (emphasis in original).

[64] *Id.* (quoting City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010)).

[65] *Klayman*, 957 F. Supp. 2d at 3621.

[66] *Id.* (quoting United States v. Jones, 132 S. Ct. 945 at 955–56 (2012) (Sotomayor, J., concurring)).

[67] 130 S. Ct. 2619 (2010).

[68] *Id.* at 2630.

[69] *Klayman*, 957 F. Supp. 2d at 22.

[70] *Id.* at 17 (citing *Jones*, 132 S. Ct. at 955–56 (Sotomayor, J., concurring)); *cf. Jones*, 132 S. Ct. at 962 (Alito, J., concurring) (stating that advances in technology may require individuals to "reconcile themselves" to the "inevitable diminution of privacy that new technology entails").

[71] *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

[72] *Id.* (internal citations omitted). The plurality and concurring opinions in *Jones* highlight the Justices' preferences for either a "reasonable expectation of privacy" theory, or a trespass theory. Thus, several Justices in *Jones* followed Fourth Amendment construct that was based on physical space. *Id.*

[73] 615 F.3d 544 (D.C. Cir. 2010).

privacy in his movements from one place to another,"[74] it does not mean that "such a person has no reasonable expectation of privacy in his movements whatsoever, without end, as the Government would have it."[75]

In addition, *Klayman* implicitly recognized that voluntary disclosure of information to a third party does not automatically extinguish an individual's expectation of privacy, nor does it render the government's sweeping surveillance program exempt from Fourth Amendment scrutiny.[76] Although citizens consciously decide to transmit personal information via a cell phone and know that it can be shared with third parties, they do so because of the ubiquity, affordability, and efficiency of this highly advanced method of communication. They do not simultaneously give the government consent to monitor their outgoing calls for whatever reason it pleases and for however long it desires.[77]

It should not matter that the government's metadata program consists only of reviewing outgoing call logs and does not reveal the user's identity. The government has the power—with no warrant and no suspicion of criminal activity—to review telephone numbers and make subjective determinations concerning which numbers create reasonable suspicion that an individual may be associated with terrorist activity. When that determination is made, the government need only have a magistrate sign off on an order that will reveal the user's identity. It is far too easy for the government to circumvent Fourth Amendment protections, in the same manner that section 41.49 gives law enforcement officers *carte blanche* to discover the names of every guest staying at hotels in Los Angeles.[78]

A. *ACLU v. Clapper:* The Third-Party Doctrine is Alive and Well in the Digital Era

In *Clapper*, the district court came to the opposite conclusion, relying largely on the third-party doctrine to hold that "individuals have no 'legitimate expectation of privacy' regarding the telephone numbers they dial because they knowingly give that information to telephone

---

[74] *Id.* at 557.

[75] *Id.* (distinguishing United States v. Knotts, 460 U.S. 276 (1983)) (holding that the use of a tracking beeper did not constitute a search where an individual was traveling from one place to another on a public thoroughfare).

[76] *See Klayman*, 957 F. Supp. 2d at 9.

[77] *See generally* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010) (discussing the particularity requirement in the context of internet searches).

[78] L.A., CAL., MUN. CODE § 41.49 (2008).

companies when they dial a number."[79] The district court held that "an individual has no legitimate expectation of privacy in information provided to third-parties,"[80] and relied on *Smith* to reject the notion that citizens retain any privacy interest in records voluntarily disclosed to third parties;

> The privacy concerns at stake in *Smith* were far more individualized . . . . *Smith* involved the investigation of a single crime and the collection of telephone call detail records collected by the telephone company at its central office, examined by the police, and related to the target of their investigation, a person identified previously by law enforcement. . . . Nevertheless, the Supreme Court found there was no legitimate privacy expectation because "[t]elephone users . . . typically know that they must convey numerical information to the telephone company; that the telephone company has facilities for recording this information; and that the telephone company does in fact record this information for a variety of legitimate business purposes."[81]

Much like a hotel registry, cell phone metadata records "are created and maintained by the telecommunications provider . . . that distinction is critical because when a person voluntarily conveys information to a third party, he forfeits his right to privacy in the information."[82]

The district court also rejected the notion that the government's analysis of metadata can "reveal a person's religion, political associations, use of a telephone-sex hotline, contemplation of suicide, addiction to gambling or drugs, experience with rape, grappling with sexuality, or support for particular political causes."[83] The court stated:

> First, without additional legal justification—subject to

---

[79] *Clapper*, 959 F. Supp. 2d at 749 (quoting *Smith*, 442 U.S. at 742) (stating that "telephone customers have no subjective expectation of privacy in the numbers they dial because they convey that information to the telephone company knowing that the company has facilities to make permanent records of the numbers they dial").

[80] *Id.* (referencing generally, *Smith*, 442 U.S.).

[81] *Id.* at 750 (referencing *Smith*, 442 U.S. at 743 (citing United States v. Reed, 575 F.3d 900, 914 (9th Cir. 2009) ("[Because] data about the 'call origination, length, and time of call'. . . is nothing more than pen register and trap and trace data, there is no Fourth Amendment 'expectation of privacy.'")) (internal citations omitted).

[82] *Clapper*, 959 F. Supp. 2d at 751 (holding that "the Government's . . . querying of . . . telephony metadata does not implicate the Fourth Amendment any more than a law enforcement officer's query of the FBI's fingerprint or DNA databases to identify someone. In the context of DNA querying, any match is of the DNA profile and like telephony metadata additional investigative steps are required to link that DNA profile to an individual"). *Id.* at 751–52 (citing Maryland v. King, 133 S. Ct. 1958, 1963–64 (2013)).

[83] *Clapper*, 959 F. Supp. 2d at 750 (quoting Decl. of Edward Felten, Professor of Computer Science and Public Affairs, Princeton University, ¶ 42 (ECF No. 27)); *see also* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment,* 111 MICH. L. REV. 311 (2012) (discussing the mosaic theory, which "considers whether a set of nonsearches aggregated together amount to a search because their collection and subsequent analysis creates a revealing mosaic").

> rigorous minimization procedures—the NSA cannot even query the telephony metadata database. Second, when it makes a query, it only learns the telephony metadata of the telephone numbers within three "hops" of the "seed." Third, without resorting to additional techniques, the Government does not know who any of the telephone numbers belong to. In other words, all the Government sees is that telephone number A called telephone number B. It does not know who subscribes to telephone numbers A or B. Further, the Government repudiates any notion that it conducts the type of data mining the ACLU warns about in its parade of horribles.[84]

The district court acknowledged that "less intrusive means to collect and analyze telephony metadata could be employed," but noted that the Supreme Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[85] Furthermore, the district court was unmoved by the sheer breadth of the Government's metadata collection program, holding that "the collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search."[86]

Likewise, the district rejected the argument that the Court's decision in *United States v. Jones*, which held that law enforcement's use of a GPS tracking device to monitor a vehicle's location for four weeks, violated the Fourth Amendment and implicated the government's metadata collection policies. Noting that "the Supreme Court did not overrule *Smith*,"[87] the district court stated that "the Supreme Court has instructed lower courts not to predict whether it would overrule a precedent even if its reasoning has been supplanted by later cases."[88] To be sure, the majority's holding was based on a trespass theory, because by placing the GPS device on the vehicle, "[t]he Government physically occupied private property for the purpose of obtaining information."[89]

---

[84] *Clapper*, 959 F. Supp. 2d at 750–51.

[85] *Id.* at 751 (stating that "judicial-Monday-morning-quarterbacking 'could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' because judges engaging in after-the-fact evaluations of government conduct 'can almost always imagine some alternative means by which the objectives might have been accomplished'") (quoting City of Ontario, Cal. v. Quon, 130 S. Ct. 2619 at 2632 (citing Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995)) (internal quotations and citations omitted).

[86] *Clapper*, 959 F. Supp. 2d at 752 (citing United States v. Dionisio, 410 U.S. 1, 13 (1973)) (holding that, where a grand jury subpoena did not constitute unreasonable seizure, it was not rendered unreasonable simply because many citizens were "subjected to the same compulsion"); In re Grand Jury Proceedings: Subpoenas Duces Tecum, 827 F.2d 301, 305 (8th Cir. 1987) (holding that a grand jury "'dragnet' operation" does not necessarily violate the Fourth Amendment) (internal citation omitted).

[87] *Clapper*, 959 F. Supp. 2d at 752.

[88] *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

[89] *Id.* (quoting *Jones*, 132 S. Ct. at 949 ("Such a physical intrusion would have been considered a

With respect to metadata, the issue does not concern a physical intrusion or even implicate the Fourth Amendment because "a subscriber has no legitimate expectation of privacy in telephony metadata created by third parties."[90]

Finally, the district court rejected the reasoning in *Klayman*, holding that, "[w]hile people may 'have an entirely different relationship with telephones than they did thirty-four years ago' . . . their relationship with their telecommunications providers has not changed and is just as frustrating."[91] Furthermore, "what metadata is has not changed over time," and the information being collected by the Government is limited to "[tele]phone numbers dialed, date, time, and the like."[92] Thus, although cell phones "have far more versatility now than when *Smith* was decided,"[93] it does not undermine "the Supreme Court's finding that a person has no subjective expectation of privacy in telephony metadata."[94] Ultimately, the district's decision came down to a single proposition: "Because *Smith* controls, the NSA's bulk telephony metadata collection program does not violate the Fourth Amendment."[95]

B. Other Decisions at the Federal and State Level

The majority of courts at the federal and state levels have upheld the constitutionality of the government's metadata collection program on the grounds than an individual has no expectation of privacy in cell phone metadata. In *United States v. Skinner*,[96] the Sixth Circuit held that a defendant had no reasonable expectation of privacy "in the data given off by his voluntarily procured pay-as-you-go cell phone."[97] The court also emphasized the fact that the defendant voluntarily disclosed the cell phone data on a public highway.[98]

'search' within the meaning of the Fourth Amendment when it was adopted.")).

[90] *Id.* (citing *Smith*, 442 U.S. at 744–45).

[91] *Clapper*, 959 F. Supp. 2d at 752 (quoting *Klayman*, 957 F. Supp. 2d at 36); *see also Reed*, 575 F.3d at 914 (finding that because "data about the 'call origination, length, and time of call . . . . is nothing more than pen register and trap and trace data, there is no Fourth Amendment 'expectation of privacy'") (internal citation omitted).

[92] *Clapper*, 959 F. Supp. 2d at 752 (quoting *Klayman*, 957 F. Supp. 2d at 35).

[93] *Id.*

[94] *Id.* (citing *Smith*, 442 U.S. at 745) ("The fortuity of whether or not the [tele]phone company in fact elects to make a quasi-permanent record of a particular number dialed does not . . . make any constitutional difference. Regardless of the [tele]phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record.").

[95] *Id.*

[96] 690 F.3d 772 (6th Cir. 2012).

[97] *Id.* at 777.

[98] *Id.* at 781.

On the other hand, the Sixth Circuit recognized that the government's argument was "strengthened by the fact that the authorities sought court orders to obtain information on [the suspect's] location from the GPS capabilities of his cell phone."[99] Likewise, in *In re Smartphone Geolocation Data Application*,[100] the Eastern District of New York held that an individual has no expectation of privacy regarding cell phone data because of the knowledge that such data may be disclosed to third parties:

> [I]t is clearly within the knowledge of cell phone users that their telecommunications carrier, smartphone manufacturers and others are aware of the location of their cell phone at any given time. After all, if the phone company could not locate a particular cell phone, there would be no means to route a call to that device, and the phone simply would not work. Given the notoriety surrounding the disclosure of geolocation data . . . cell phone users cannot realistically entertain the notion that such information would (or should) be withheld from federal law enforcement agents searching for a fugitive. . . . [I]ndividuals who do not want to be disturbed by unwanted telephone calls at a particular time or place simply turn their phones off, knowing that they cannot be located.[101]

In *United States v. Caraballo*,[102] the United States District Court for the District of Vermont suggested that an individual's expectation of privacy in cell phone data location may hinge on whether the disclosure of such data occurred "in the ordinary course of providing cellular phone service."[103] In *Caraballo*, the data was obtained by "pinging" the defendant's cell phone, which was a "special, surreptitious procedure not available to the general public, initiated solely by law enforcement, [and] without notice or any other volitional activity by the Defendant other than having his phone in the 'on mode.'"[104] Thus, the district court distinguished *Smith* and *Miller* because pinging was not "part and parcel of the provision of cellular phone service."[105] The court declined, however, to resolve the "thorny question of whether an individual *generally* maintains a subjective expectation of privacy in his or her real-time location data where that information is obtained exclusively through

---

[99] *Id.* at 779.

[100] 977 F. Supp. 2d 129.

[101] *Id.* at 146; *see also* Application of the United States of America for Historical Cell Site Data, 724 F.3d 600, 611–13 (5th Cir. 2013) (noting that by expressly agreeing to provider's privacy policies, cell phone users cede any expectation of privacy for cell cite data).

[102] 963 F. Supp. 2d 341, 360 (D. Vt. 2013).

[103] *Id.*

[104] *Id.*

[105] *Id.*

pinging,"[106] because the government's conduct fell within the exigent circumstances exception.

In *In re Application of the Federal Bureau of Investigation*,[107] the United States Foreign Surveillance Court upheld the government's metadata collection program and reaffirmed the third-party doctrine's core principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[108] The doctrine applies regardless of the "disclosing person's assumptions or expectations with respect to what will be done with the information following its disclosure."[109]

Furthermore, the disclosing party has no "reasonable expectation with respect to how the government will use or handle the information after it has been divulged by the recipient."[110] The court also emphasized that the cell phone data does not reveal "subscriber[s'] names or addresses or other identifying information,"[111] and can only be "accessed for analytical purposes after [the] NSA has established a reasonable articulable suspicion . . . that the number to be used to query the data—the 'seed'—is associated with one of the terrorist groups listed in the Order."[112] Consequently, these safeguards undermine the assertion that metadata collection is sufficiently intrusive to raise Fourth Amendment concerns.[113] The court held that *Jones* was largely irrelevant because the Court's decision was predicated on a trespass theory and never discussed the issue of whether individuals have a reasonable expectation of privacy in terms of cell phone metadata.

These decisions rely not only on the third-party doctrine, but on cases such as *United States v. Knotts*,[114] which emphasized the physical space in which the search occurred.[115] In *Knotts*, the Supreme Court held that the use of a beeper to monitor a suspect's location and activities did not violate the Fourth Amendment, because the form of surveillance was akin to "following of an automobile on public streets and highways,"[116] where an individual has a diminished expectation of privacy. By the same token, the *Knotts* Court acknowledged that the owner of the cabin where the defendant was traveling did have an expectation of privacy within the cabin, thus limiting law enforcement's surveillance to the period when the defendant was traveling in his automobile.[117] Similarly,

---

[106] *Id.*
[107] No. BR 14-01, 2014 WL 5463097 (Foreign Intell. Surveillance Ct., March 20, 2014).
[108] *Id.* at *6 (quoting Smith, 442 U.S. at 743–44).
[109] *Id.* (quoting *Smith*, 442 U.S. at 744).
[110] *Id.* at *7.
[111] *Id.* at *8.
[112] *Id.*
[113] *Id.*
[114] 460 U.S. 276 (1983).
[115] *Id.* at 287.
[116] *Id.* at 281.
[117] *Id.* at 282.

the Court held in *United States v. Karo*,[118] "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment."[119]

The Court's decisions in *Jones* and *Riley*, however, undercut the pre-digital era distinction between private and public space and called into question the continuing vitality of the third-party doctrine. *Jones* recognized that the length of time within which the surveillance is conducted, and possibly the number of individuals affected, may impact the constitutionality of the search. This aspect of *Jones* casts doubt on the district court's holding in *Clapper* that "the collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search."[120] As the *Jones* Court noted, a relatively brief period of surveillance does not implicate Fourth Amendment protections,[121] but the duration of that surveillance can transform a perfectly lawful search into one that infringes on privacy rights. As such, *Jones* undermines the Court's statement in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[122]

Moreover, in *Riley*, the Supreme Court acknowledged that cell phones store uniquely private information, such as confidential documents, financial records, photographs, and letters that in the pre-digital era were located in a home.[123] These items, which constitute the "papers and effects" that the Fourth Amendment has historically protected, did not receive less protection merely because an individual was traveling on a public highway.[124] Although the government's collection of metadata does not include such information, the point in *Riley* was that the focus on physical space was less relevant to the reasonableness of the search, particularly in the digital era. Likewise, in *State v. Earls*, the New Jersey Supreme Court held that cell phone users had a reasonable expectation of privacy over data disclosing their location[125] and noted that "[m]odern cell phones . . . blur the historical distinction between public and private areas because cell phones emit signals from both places."[126] Thus, *Jones* and *Riley* indicate that factors such as the length and intrusiveness of the surveillance, as well as the quality *and* quantity of the information collected, bear directly on

---

[118] 468 U.S. 705 (1984).
[119] *Id.* at 707.
[120] *Clapper*, 959 F. Supp. 2d at 751.
[121] *Jones*, 132 S. Ct. at 945.
[122] *Knotts*, 460 U.S. at 281–82.
[123] *Riley*, 134 S. Ct. at 2483.
[124] *Id.* at 2488.
[125] State v. Earls, 214 N.J. 564, 569 (2013); *see also U.S. ex rel. Order Pursuant to 18 U.S.C. Section 2703(d)*, 2012 WL 4717778 (S.D. Tex. September 26, 2012) (Owsley, M.J) (invalidating the government's warrantless search of cell phone metadata).
[126] *Earls*, 214 N.J. at 586.

whether an individual had an expectation of privacy in the information subject to a search.

The Foreign Surveillance Court's decision, although upholding the government's metadata collection program, suggested that the intrusiveness of the search, and the requirement that the government establish reasonable suspicion before accessing information beyond the numbers called, impacted its constitutionality. Specifically, the court emphasized that "the non-content metadata at issue here is particularly limited in nature and subject to strict protections that do not apply to run-of-the-mill productions of similar information in criminal investigations."[127] Thus, if the intrusiveness of the search degree of individualized suspicion is relevant, then the notion that individuals, after disclosing information to a third party, have no expectation of privacy "with respect to what will be done with the information following its disclosure"[128] is no longer valid. Furthermore, at least one other court has applied *Jones* to the government's metadata collection program, holding that the continuous monitoring of cell phone location data violates the Fourth Amendment.[129]

Simply put, the third-party doctrine, and the concept of voluntary disclosure, must be reexamined. Although *Smith* and *Miller* need not be overruled, the Court should limit the third-party doctrine by holding that the disclosure of information to third parties does not constitute a blanket waiver of all expectations of privacy to anyone who may access the information and use it for whatever reason. After all, cell phones have become ubiquitous in society and store a virtual warehouse of information, much of which is private. In addition, cell phones are used for a variety of purposes, such as to check email, hold conference calls, download books and videos, and store confidential information. The fact that the government's metadata collection program, like an inspection of a hotel guest registry, can only monitor outgoing calls and location does not mean that the search is *per se* reasonable; it depends on factors such as the quantity of information being collected, the length of time in which a particular caller is being monitored, and the ease with which the Government can go the extra step and discover the identity of the caller. In short, the relevant question, and one that would take into account the factors discussed in *Jones*, *Riley*, and *In re Application of Federal Bureau of Investigation*, is whether the search "exceeded society's

---

[127] Application of Federal Bureau of Investigation, 2014 WL 5463097 at *8.

[128] *Id.* (quoting *Smith*, 442 S.S. at 744).

[129] United States v. Powell, 943 F. Supp. 2d 759, 776 (E.D. Mich. 2013) (holding that long-term monitoring of an individual via a cell phone was invalid absent probable cause, although the evidence was admissible because the government relied on the defective warrant in good faith); *but see* Application of the United States of America for an Order Pursuant to 18 U.S.C. 2703(c) Directing AT&T, Sprint/Nextel, T-Mobile, Metro PCS and Verizon Wireless to Disclose Cell Tower Log Information, No. M-50, WL 4388397 (S.D.N.Y. 2014) (holding Fourth Amendment does not preclude government form requiring cell phone service providers to disclose cell site data).

expectations for how the police would investigate a particular crime."[130]

In *Patel*, the outcome should not be in doubt because law enforcement can learn the identity of every guest in a hotel, including the guest's room and license plate numbers, without any suspicion or pre-compliance judicial review. Even the government, in its metadata program, cannot go to such lengths without prior judicial approval. The critical question is whether the Court will limit the scope of the third-party doctrine. If it does, the impact on the government's surveillance efforts will be substantial.

III. *CITY OF LOS ANGELES V. PATEL*: THE COURT SHOULD LIMIT *SMITH V. MARYLAND* AND MODIFY THE THIRD-PARTY DOCTRINE

In *Patel*, the Court should do what it did in *Riley*: recognize that some pre-digital era doctrines are no longer workable. This includes the third-party doctrine, which in *Patel* was applied to reject any contention that hotel guests have an expectation of privacy in their name, room number, and length of stay. This is problematic, and demonstrates that third-party doctrine is in need of Supreme Court review. Indeed, section 41.49 gives law enforcement the power to discover the following information about every guest in a hotel:

- the guest's name, room, and license plate number;
- the make and model of the guest's car;
- the number of people staying in the guest's hotel room; and
- the arrival and departure dates.[131]

Given that law enforcement is not subject to any judicial oversight whatsoever, focusing solely on whether a hotel owner has a reasonable expectation of privacy in a guest registry ignores the critical issue that underscored Justices Sotomayor and Alito's opinions in *Jones*: whether the third-party doctrine is appropriate in the digital era. To limit the inquiry to hotel owners is akin to asking only whether Verizon Wireless has a reasonable expectation of privacy in its customer lists. The answer to those questions should be yes, but the issue that is missed within such a narrow inquiry is whether hotel *occupants* and cell phone *users* forfeit their privacy rights simply upon checking into a hotel, or making a call from a smart phone. In other words, a hotel owner's expectation of privacy in a guest registry is the tip of the iceberg. The hotel guests' privacy rights—just like the cell phone user's and the internet

---

[130] *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

[131] *See* L.A., CAL. MUN. CODE ch. IV, art. 1, §41.49 (2008).

subscriber's—is where the rubber meets the constitutional road.

The issue lurking in the background of *Patel* transcends hotel owners, highly regulated industries, and Holiday Inns. It is about whether the third-party doctrine, created during the disco era when rotary telephones were in vogue, adequately protects privacy rights in the digital era.[132] The answer to this question should be no. If the answer to this question is yes, and the third-party doctrine remains intact in its current form, then a hotel owner must provide all of this information to law enforcement officers regardless of whether the officers have probable cause, reasonable suspicion, or even a hunch that criminal activity is afoot. All of this happens without any judicial oversight whatsoever.[133] To make matters worse, if the hotel operator refuses law enforcement's demand, he or she may spend the night in the Los Angeles County Jail awaiting a trial on charges that can result in six months' imprisonment and a stiff fine.[134]

This scenario should be found unreasonable under the Fourth Amendment. As Chief Justice Roberts stated in *Riley*, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[135] In *Riley*, Chief Justice Roberts explained that the reasonableness standard involves "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[136] The Court's "reasonableness balancing"[137] test derives from the Fourth Amendment's text, which prohibits "unreasonable searches and seizures,"[138] and the Court's precedent, which does not impose a categorical warrant requirement on law enforcement. The reasonableness test is beneficial in some respects because it ensures that a suspect's privacy interests, not merely the asserted interests of law enforcement, will factor into the determination of whether a particular search is constitutional.

On the other hand, arriving at a workable definition of reasonableness, or identifying standards to guide the reasonableness analysis, can prove difficult. As such, the reasonableness standard risks importing subjectivity into the decision-making process, and may result in case-by-case decision-making that fails to produce a cohesive jurisprudence in this area. Notwithstanding, the fact that the Court is willing to balance privacy rights against governmental interests reveals

---

[132] *See Miller*, 425 U.S. 435, 443.

[133] *See Patel*, 738 F.3d at 1064 ("As presently drafted, §41.49 provides no opportunity for pre-compliance judicial review of an officer's demand to inspect a hotel's guest records.").

[134] *See id.* (stating a violation of §41.49 is a misdemeanor, "punishable by up to six months in jail and a $1000") (citing L.A., CAL., MUN. CODE ch. I, art. 1 § 11.00(m) (2004)).

[135] *Riley*, 134 S. Ct. at 2482 (quoting Brigham City v. *Stuart*, 547 U.S. 398, 403 (2006)); *see also Patel*, 738 F.3d at 1061 ("The 'papers' protected by the Fourth Amendment include business records like those at issue here.").

[136] *Riley*, 134 S. Ct. at 2484 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

[137] Case Comment, *Fourth Amendment: Riley v. California*, 128 HARV. L. REV. 251 (2014).

[138] U.S. CONST. amend. IV.

that the government's justifications alone, even if legitimate, must also be sufficiently compelling to outweigh a citizen's privacy rights, or at least be no broader than necessary to achieve the asserted interest.

In the context of section 41.49, the authority given to law enforcement is patently unreasonable. Warrantless searches of hotel guest registries, like the placement of a GPS tracking device on a car, the government's collection of metadata, or the monitoring of internet search history, indiscriminately affects all citizens.[139] The threat to core privacy protections cannot be denied, and the remedy lies in modifying the third-party doctrine. In its opinion, the Ninth Circuit relied on Supreme Court precedent and assumed without discussion that the third-party doctrine was still good law.[140]

Thus, regardless of whether this Court reverses or affirms the Ninth Circuit, one can assume that the Ninth Circuit's assumption was correct if it says nothing about the third-party doctrine. The likely impact will be that the government will continue tracking outgoing calls from citizens everywhere. After all, it would be difficult to argue that motorists have a greater expectation of privacy in the numbers dialed from an automobile than they would have in their name and location at a hotel in Los Angeles. In fact, if the Fourth Amendment were interpreted to permit law enforcement to obtain the names and room numbers of every guest in a hotel in Los Angeles County without a warrant or scintilla of suspicion, then there would be no controlling principle stopping the government from collecting cell phone metadata, which typically reveals outgoing phone calls but does not typically disclose the user's identity.[141]

The time has arrived "to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."[142] As part of this inquiry, the Supreme Court should refine its approach to determining whether searches like those at issue here violate the Fourth Amendment. The Court should consider, *inter alia*, the length and intrusiveness of a search, the quantity and quality of data collected, the amount of time that data is kept, and the

---

[139] *See* Brian Owsley, *Trigger Fish, Sting Rays, and Fourth Amendment Fishing Expeditions*, 66 HASTINGS L. J. 183, 224 (2014) (discussing *Jones*, 132 S. Ct. 945, and noting that, at oral argument, "Chief Justice Roberts appeared to address the reasonable expectation of privacy as it relates to him . . . the reason for this expectation could arguably be based on the personal nature of one's vehicle and travels.").

[140] *See Patel*, 738 F.3d at 1062.

[141] *See* Application of the Fed. Bureau of Investigation, No. BR 14-01, 2014 WL 5463097 at *8 (FISA Ct. Mar. 20, 2014) (emphasizing that the cell phone data collected does not reveal "subscribers names or addresses or other identifying information." Such information can only be "accessed for analytical purposes after the NSA has established a reasonable articulable suspicion . . . that the number used to query the data—the 'seed'—is associated with one of the terrorist groups listed in the Order.").

[142] *See Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring); *see also* Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) ("Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.").

level of suspicion required to obtain the information.[143]

In so doing, the Court would recognize that the third-party doctrine "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[144] We no longer live in a world of pen registers and plastic containers.[145] The principle that individuals have no reasonable expectation of privacy "with respect to how the Government will use or handle the information after it has been divulged by the recipient" fails to consider that "technology now allow[ing] an individual to carry . . . [private] information in his hand does not make the information any less worthy of the protection for which the Founders fought."[146] To be sure, it is "one thing to say that people expect phone companies to occasionally provide information to law enforcement," but "quite another to suggest that our citizens expect all phone companies to operate . . . a joint intelligence gathering operation with the government."[147] More specifically, monitoring calls from a single suspect's residence "in no way resembles the daily, all-encompassing, indiscriminate dump of cell phone metadata that the NSA now receives as part of its . . . Metadata Program."[148]

A citizen who signs a contract with a cell phone service provider in the digital era is not analogous to the person in the pre-digital era who hands over confidential records to a bank teller. It is one thing for customers to know that the bank teller may disclose such information to the government in connection with criminal and regulatory investigations.[149] It is quite another to hold that an outgoing call may be part of a vast and suspicionless government dragnet that relies on "national security" to justify a much less supportable—and far more intrusive—version of the sobriety checkpoint.[150] Comparing the search

---

[143] *See, e.g.*, *Jones*, 132 S. Ct. at 945 (finding that the Fourth Amendment violation was based in substantial part on the length of search—twenty-eight days—not merely on the use of a GPS tracking device to monitor a suspect's whereabouts); Riley v. California, 134 S. Ct. 2473, 2488 (2014) ("[C]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person."); Maryland v. King, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (expressing concern that, "because as an entirely predictable consequence of today's decision [allowing law enforcement to take a DNA sample from an arrestee], your DNA can be taken and entered into a national database if you are ever arrested, rightly or wrongly, and for whatever reason").

[144] *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

[145] *See Smith*, 442 U.S. at 735; United States v. Robinson, 414 U.S. 218, 236 (1973) (holding that law enforcement may search the contents of a crumpled cigarette pack found on an arrestee's person).

[146] *Riley*, 132 S. Ct. at 2492 (brackets added).

[147] Klayman v. Obama, 975 F. Supp. 2d at 1, 33. (D.D.C. 2013).

[148] *Id.*; *see also Riley*, 132 S. Ct. at 2482 (holding that "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity," which is not "limited by physical realities").

[149] *See* United States v. Miller, 425 U.S. at 435, 442–43 ("The expressed purpose of [the Bank Secrecy Act] is to require records to be maintained because they "have a high degree of usefulness in criminal tax, and regulatory investigations and proceedings.'") (quoting 12 U.S.C. §1829b(a)(1)).

[150] *See Klayman*, 957 F. Supp. 2d at 33 ("The Supreme Court itself has long-recognized a

of a hotel guest registry or the collection of metadata to a pen register or a crumpled cigarette pack is "like saying a ride on horseback is materially indistinguishable from a flight to the moon."[151] To be sure, "[b]oth are ways of getting from point A to point B, but little else justifies lumping them together."[152]

Furthermore, it is not sufficient to say that the government's collection of metadata, unlike the searches of hotel guest registries, does not reveal a person's name.[153] What matters is that the government has the power to monitor *every* citizen's outgoing call history, and if it uncovers a few calls to Pakistan or Yemen, the government can seek an order that will disclose a motorist's identity and location. Moreover, it is not sufficient to rely on the government to establish procedures that ensure compliance with the Fourth Amendment.[154] Admittedly, the government should be given sufficient latitude to investigate threats to national security, and the interest in preventing a terrorist attack is certainly of the highest order. But this does not, and should not, mean that the government can do that which the Fourth Amendment prohibits, or simply be trusted to comply with constitutional demands when legitimate Fourth Amendment questions are raised. The purpose of the Fourth Amendment is to prohibit arbitrary and unreasonable intrusions by the government on personal privacy. Giving the government the means to define the limits of this power—when it is in the government's interest to have no limits whatsoever—would all but ensure that privacy rights would evaporate in the name of national security. Such an approach would also lend credence to Justice Thurgood Marshall's statement that "grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[155]

In addition, giving the government such broad latitude ignores the fact that citizens do have at least some expectation of privacy in the numbers they dial, particularly in the location from which those numbers are dialed.[156] In fact, the lower court's reliance on the third-party

---

meaningful difference between cases in which a third party collects information and then turns it over to law enforcement, and cases in which the government and the third party create a formalized policy under which the service provider collects information for law enforcement purposes.") (internal citation omitted)); *see also* Mich. Dep't of State Police v. Sitz , 496 U.S. 444, 447 (1990) (upholding a sobriety checkpoint against a Fourth Amendment challenge).

[151] *Riley*, 134 S. Ct. at 2488; *see also Klayman*, 957 F. Supp. 2d at 37 ("[T]he *Smith* pen register and the ongoing NSA Bulk Telephony Metadata Program have so many significant distinctions between them that I cannot possibly navigate these uncharted Fourth Amendment waters using as my North Star a case that predates the rise of cell phones.").

[152] *Riley,* 134 S. Ct. at 2488.

[153] *See Clapper*, 959 F. Supp. 2d at 752 ("what metadata is has not changed over time," and the information being collected by the Government is limited to "[tele]phone numbers dialed, date, time, and the like") (brackets in original).

[154] *See Riley*, 134 S. Ct. at 2491 ("[T]he Founders did not fight a revolution to gain the right to government agency protocols.").

[155] Skinner v. Railway Labor Execs. Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

[156] *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her

doctrine in *Patel*, as in the context of metadata collection, rather than on the lack of an expectation of privacy in metadata itself, suggests that citizens would have an expectation of privacy in this information if it has not initially been disclosed to a third party. The expectation of privacy in metadata is strengthened by the fact that cell phones are not a rare technological luxury. Rather, cell phones are a routine part of daily life for millions of citizens; they are a repository for the type of private information that would have historically been located in a home, and are used for a variety of purposes other than merely communicating with third parties.[157] Given this fact, the Court should hold that, before the government can indiscriminately collect metadata, it must have a lawful basis to do so.[158]

The bottom line is that law enforcement and the government should not be permitted to use modern technology as a means to rummage through hotel guest registries and call logs for the same reason they cannot "rummage through homes in an unrestrained search for evidence of criminal activity."[159] The Founders drafted the Fourth Amendment to avoid the "reviled 'general warrants' and 'writs of assistance' of the colonial era,"[160] which permitted British officers to search any area of a home regardless of whether evidence relating to the crime under investigation could be found there. Plainly, once officers had probable cause to believe that someone had committed a crime, they had *carte blanche* to search anywhere in the person's home for incriminating evidence that could be used at a subsequent trial. The Fourth Amendment's particularity requirement prohibited this practice by confining searches to areas where evidence of the specific crime(s) identified in the warrant, and giving rise to the suspicion, could be found. As such, the particularity requirement minimized the invasion of a citizen's privacy.[161] Prior to *Riley*, warrantless cell phone searches were the digital era's version of the general warrant because they gave law enforcement the unfettered authority to search any area of a cell phone incident to arrest. In doing so, officers could—and did—discover the most intimate details about an arrestee's private life.

---

familial, political, professional, religious, and sexual associations."); *Patel*, 738 F.3d at 1062–63 ("That the inspection may disclose 'nothing of any great personal value' to the hotel—on the theory, for example, that the records contain 'just' the hotel's customer list—is of no consequence" because "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable.") (quoting *Arizona v. Hicks*, 480 U.S. 321, 325 (1987)).

[157] *Riley*, 134 S. Ct. at 2482.

[158] *See* Minnesota v. Dickerson, 508 U.S. 366 (1993) ("[I]f police are lawfully in a position from which they view an object, if its incriminating character is apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.").

[159] *Riley*, 134 S. Ct. at 2494.

[160] *Id.* (quoting Boyd v. United States, 116 U.S. 616, 626 (1886)).

[161] *See, e.g.*, Berger v. State of New York, 388 U.S. 41, 55 (1967) ("The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also '*particularly* describing the place to be searched, and the persons or things to be seized.'") (emphasis added).

In an era where technological advances have enabled the government to conduct unprecedented surveillance over its citizens, such searches posed threats to privacy that could not be underestimated.[162] Yet, this is precisely what the third-party doctrine enables; it strips citizens of any expectation of privacy in data or objects being searched, simply because they provided that information to a third party for a limited purpose. For this and other reasons, *Patel* presents the Court with an ideal opportunity to modify the third-party doctrine and apply the brakes to investigatory practices that run roughshod over Fourth Amendment freedoms. Indeed, the constitutionality of Los Angeles Municipal Code section 41.49 is the tip of an iceberg that can—and should—lead to a doctrinal shift in favor of stronger privacy protections.[163]

Specifically, the Court should reexamine the third-party doctrine. It should shift the focus from whether an individual has an expectation of privacy in a guest registry or in cell phone metadata, and instead inquire whether a search "exceeded society's expectations for how the police would investigate a particular crime."[164] In *Jones*, for example, several Justices appeared to focus less on whether the suspect had a subjective expectation of privacy in data revealing his location, and more on whether *society* would collectively expect that such information would be protected from warrantless intrusion by law enforcement. Justice Alito stated in his concurrence that "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement."[165] Likewise, Justice Sotomayor discussed in her concurrence the "existence of a reasonable societal expectation of privacy in the sum of one's public movements."[166]

Of course, regardless of whether the Court elects to reexamine the third-party doctrine, it should hold that, before law enforcement can discover whether someone is staying at a hotel, it must provide reasonable, articulable facts upon which to conclude that an individual at a particular hotel may be engaged in criminal conduct. A similar standard

---

[162] *See Riley*, 134 S. Ct. at 2492–93; *see also* Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) ("The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping."); Florida v. Jardines, 133 S. Ct. 1409 (2013) (holding that the use of a trained dog to sniff for narcotics on a homeowner's front porch is a search and therefore requires a warrant and probable cause); Skinner v. Railway Labor Execs. Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (pointing out that "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure").

[163] *See Patel*, 738 F.3d at 1060.

[164] *Jones*, 132 S. Ct. at 964 (Alito, J., concurring); *see also* Katz v. United States, 389 U.S. 347 (1967) (extending First Amendment protection to areas where an individual has a reasonable expectation of privacy).

[165] *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

[166] *Id.* at 956 (Sotomayor, J., concurring).

was adopted in *Terry v. Ohio*,[167] where the Court held that, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[168] Likewise, 18 U.S.C. §2703(d) (the Stored Communications Act), although quite lenient in its threshold warrant requirement, at least requires the government to set forth "specific and articulable facts showing that there are reasonable grounds to believe [that the particular records] sought, are relevant and material to an ongoing criminal investigation."[169] Put bluntly, the reasonable suspicion standard will ensure the stamp of judicial approval is made of something other than rubber.

After all, imagine a world in which law enforcement officers could obtain any citizen's name and location without a warrant, with *only* an erroneous belief about the law(s) the citizen is believed to have violated.[170] We are one decision away from that world. In *Jones*, Justice Alito stated that "even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable."[171] That is a tradeoff no citizen—or this Court—should find worthwhile.

IV. CONCLUSION

Enforcing the Fourth Amendment's protections has become akin to walking through a dark tunnel toward a bright light while trying to avoid carefully placed landmines. Citizens should not be forced to travel through such treacherous terrain to enforce basic privacy protections, and law enforcement should not have such an easy path to act on a mere hunch—or no hunch at all.[172] It should not matter if an individual's expectation of privacy with regards to his or her name and whereabouts is less important at a hotel than in a home, or that the hotel in which they stay is part of a highly-regulated industry. What matters is that law enforcement's ability to uncover this information is, for all intents and purposes, entirely unregulated.[173]

City of Los Angeles v. Patel may be the case no one is talking about, but it raises a foundational question in modern-day Fourth Amendment jurisprudence: whether the third-party doctrine, which was

---

[167] 392 U.S. 1, 21 (1968).
[168] *Id.* at 21.
[169] 18 U.S.C. 2703(d) (brackets added).
[170] *See* Heien v. North Carolina, 135 S. Ct. 530 (2014).
[171] 132 S. Ct. at 962 (Alito, J., concurring).
[172] *See Riley*, 134 S. Ct. at 2488 ("The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.").
[173] *Riley*, 134 S. Ct. at 2488.

established in the pre-digital era, is appropriately suited to an era in which law enforcement can sift through guest registries on a whim, and the government can indiscriminately track cell phone metadata. The answer to this question should be no. As Justice Sotomayor wrote in *Jones*, privacy rights should evolve to account for the new threats posed by advances in technology and by the unprecedented manner in which law enforcement and the government monitor their citizens.

Part of that evolution should, as Justice Alito stated in *Jones*, recognize that the expectations of society matter, because societal expectations influence the public's perception of government conduct and the fairness of the methods the government uses to protect its people. If the Court confronts the third-party doctrine in *Patel*, it should ask whether society would find reasonable the proposition that once you disclose information to a third party, you thereby disclose it to the world. The answer will surely be no.

Notes

Heightened Equal-Protection Scrutiny Applies to the Disparate-Impact Doctrine

By Scott E. Rosenow·

· J.D., 2013, University of Wisconsin Law School; B.A., 2010, University of Wisconsin at Madison. Mr. Rosenow drafted this Note while holding a fellowship at the Pacific Legal Foundation in California. When he accepted an offer to publish this Note, he was a law clerk for a Wisconsin Supreme Court justice. When this Note was published, Mr. Rosenow was an Assistant Attorney General at the Wisconsin Department of Justice. The views expressed in this Note are solely those of the author.

I. INTRODUCTION

More than one-hundred firefighters took tests in 2003 to qualify for promotions in the City of New Haven, Connecticut.[1] Although the city tried to ensure that the tests would not disadvantage any racial or ethnic groups,[2] most of the firefighters who scored highly enough for promotions were Caucasian.[3] Few Hispanic or African-American firefighters passed the tests.[4] The city discarded the test results out of fear that it could face disparate-impact liability[5] because "too many whites and not enough minorities would be promoted" if the city used the test results.[6] Several of the firefighters who passed the tests sued the city

---

[1] Ricci v. DeStefano, 557 U.S. 557, 561 (2009).
[2] *Id.* at 563–66 (2009).
[3] *Id.* at 566. *See infra* Part III.B.2.d.
[4] *Ricci*, 557 U.S. at 566.
[5] The disparate-impact doctrine will be further explained in Part I of this Note.
[6] *Ricci*, 557 U.S. at 579 (quotation marks omitted) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009)).

under Title VII of the Civil Rights Act,[7] on the ground that it engaged in race-based disparate treatment[8] against them.[9] In this case, *Ricci v. DeStefano*, the U.S. Supreme Court held that the city was liable for disparate treatment because it failed to prove that it had a strong basis in evidence to believe it would have been liable for disparate impact if it made promotions based on the test results.[10]

The plaintiffs in *Ricci* also argued the city engaged in racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment[11] when it discarded the test results.[12] The Court declined to resolve this issue because it held that the city was liable for committing disparate treatment prohibited under Title VII, thus rendering unnecessary the resolution of whether the city was liable for violating the Constitution.[13] Justice Antonin Scalia wrote a concurring opinion to note that the Court's resolution of the case "merely postpones the evil day on which the Court will have to confront" whether an action taken to avoid potential disparate-impact liability violates equal protection.[14] He noted that disparate-impact avoidance seems to conflict with equal protection.[15] In a dissenting opinion, Justice Ruth Bader Ginsburg argued the city did not commit disparate treatment or violate equal protection,[16] so she effectively denied that an action taken to avoid a racially-disparate impact could violate equal protection.[17]

Much academic scholarship in response to *Ricci* has focused on whether Title VII's disparate-impact provision would survive strict

---

[7] 42 U.S.C. § 2000e *et seq*. This Note will refer to this law as "Title VII."

[8] The disparate-treatment doctrine will be further explained in Part I of this Note.

[9] *Ricci*, 557 U.S. at 562–63.

[10] *Id.* at 563. A state actor may justify its race-based different treatment under the equal protection clause if the actor has a strong basis in evidence that the differentiation was necessary to remedy the actor's past intentional racial discrimination. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 277–78 (1986) (plurality opinion); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500, 509, 511 (1989) (plurality opinion); Miller v. Johnson, 515 U.S. 900, 922 (1995); *see* Wash. v. Davis, 426 U.S. 229, 245–48 (1976) (stating that showing a strong basis in evidence of intentional discrimination is more difficult than showing a strong basis in evidence of potential disparate-impact liability); *infra* note 253.

[11] U.S. CONST. amend. XIV, § 1. This Note's references to equal protection or the equal protection clause refer to the Fourteenth Amendment's Equal Protection Clause, the equal-protection component of the Fifth Amendment's Due Process Clause, or both, depending on the context. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–18 (1995) (explaining that these two constitutional guarantees of equal protection operate identically except that one applies to state and local governments and the other applies to the federal government).

[12] *Ricci*, 557 U.S. at 562–63.

[13] *Id.* at 563, 584, 593.

[14] *Id.* at 594 (Scalia, J., concurring).

[15] *Id.* at 594–95 (Scalia, J. concurring).

[16] *Id.* at 619–20 (Ginsburg, J., dissenting). *See infra* note 185 and accompanying text (noting Justice Ginsburg's argument that the city's actions were race neutral because the test results were discarded and no firefighters were promoted). *See also infra* text accompanying note 197 (arguing that no employees had a "vested right to promotion").

[17] *See infra* note 179 (arguing that while disparate treatment analysis is not identical under Title VII and the Equal Protection Clause, much of the *Ricci* court's analysis would transfer to the equal protection context).

scrutiny[18] under the Equal Protection Clause.[19] But much of this scholarship assumed that an employer triggers strict scrutiny by discarding test results to avoid a racially-disparate impact.[20] The assumption is understandable because the Equal Protection Clause and Title VII's disparate-treatment provision prohibit largely the same conduct,[21] and the majority opinion in *Ricci* held that New Haven's disparate-impact avoidance was illegal disparate treatment.[22] But the majority opinion never bothered to explain that holding,[23] and four justices disagreed with it.[24] No justice joined Justice Scalia's concurrence.[25]

This Note attempts to fill the majority opinion's void[26] by arguing

---

[18] For an overview of the tiers of judicial scrutiny, *see* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985); *see infra* note 159. *See also* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1502–03 (2002) (explaining that three to six tiers exist).

[19] *See, e.g.*, Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1 (2010)) ("[*Ricci*] is likely to lead to an increase in disparate impact claims, and soon the disparate impact provision may have to reckon with the Equal Protection Clause . . . . This Article examines the constitutional question left open by the Court in *Ricci*."); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535 (2011) ("This Article concludes that the disparate impact provision is unlikely to pass the narrowly tailored requirement and risks being invalidated on 'the evil day' when the provision is challenged under the Equal Protection Clause."); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1375–82 (2010) (discussing several potentially compelling interests that could justify Title VII's disparate-impact provision under strict scrutiny); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2179–99 (2013) ("Title VII's disparate-impact provision can withstand constitutional attack only if it satisfies strict scrutiny—that is, if it is narrowly tailored to achieve a compelling governmental interest.").

[20] *See* Allen R. Kamp, Ricci v. DeStefano *and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 35 (2011) ("Although the commentary has focused on how *Ricci* almost terminated disparate impact as a viable theory of liability, it must be remembered it did that only after finding disparate treatment."); Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 17 (2010) ("[T]his Article will proceed on the presumption that the disparate impact provision is a racial classification that triggers strict scrutiny."); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2168 n.47 (2013) (citing several articles that briefly argued that an action taken to avoid a disparate impact does not conflict with equal protection). *But see* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506–15 (2003) (discussing whether a disparate-impact provision classifies by race).

[21] *See infra* note 179 and accompanying text (comparing disparate-treatment analysis under Title VII and the Equal Protection Clause). *Cf. infra* note 27 (discussing the state-action doctrine).

[22] *Ricci*, 557 U.S. at 585 (2009).

[23] *See infra* note 178 and accompanying text (discussing why the court had to express its assumption that avoiding disparate impact can constitute different treatment based on race "in its own voice and without citation").

[24] *Ricci*, 557 U.S. at 608 (Ginsburg, J., dissenting, joined by Stevens, Souter, Breyer, JJ.). *See infra* note 185 and accompanying text (discussing Justice Ginsburg's dissent in greater detail); text accompanying *infra* note 197 (theorizing how Justice Ginsburg would respond to the holding of *New York City Transit Authority v. Beazer*).

[25] *Ricci*, 557 U.S. at 594 (2009) (Scalia, J., concurring).

[26] *See* Ngov, *supra* note 20, at 17 n.86 ("A normative discussion of whether neutral practices that are race conscious should be subject to strict scrutiny is a subject for an article in itself."). This Note attempts to provide the discussion predicted by Professor Ngov, although this Note views disparate-impact avoidance as non-neutral and race-based, rather than neutral and race-conscious.

that an employer[27] triggers equal-protection strict scrutiny by discarding test results to avoid a racially-disparate impact. Part I of this Note serves as an introduction, while Part II provides a brief overview of Title VII's disparate-impact doctrine. Part III provides an in-depth view of equal protection. Specifically, Part III.A discusses an important and often-overlooked issue that this Note calls "step one" of equal protection. This issue focuses on when an official act implicates[28] equal protection—in other words, when an official act triggers any kind of equal-protection scrutiny at all.[29] This Note argues that an official act triggers equal-protection scrutiny to the extent it treats people differently than each other.[30] Part III.B discusses the more familiar "step two" of equal

---

[27] Title VII's disparate-treatment provision prohibits certain conduct by private or public employers. Bazemore v. Friday, 478 U.S. 385, 394 n.5 (1986) (Brennan, J., joined by all other Members of the Court, concurring in part). By contrast, the Equal Protection Clause prohibits only state action, not private action. *E.g.*, United States v. Morrison, 529 U.S. 598, 621 (2000). Thus, the Equal Protection Clause prohibits racial discrimination by a public, but not a private, employer. *See id.* (quoting Shelley v. Kraemer, 334 U.S. 1, 13, and n. 12 (1948)) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."). But equal protection is violated if a private employer engages in racial discrimination when required to do so by the state, such as Title VII's disparate-impact provision. *See Ricci*, 557 U.S. at 594 (2009) (Scalia, J., concurring) (citing Buchanan v. Warley, 245 U.S. 60, 78–82 (1917)) ("[I]f the Federal Government is prohibited from discriminating on the basis of race . . . then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race."); *see also* Adickes v. S. H. Kress & Co., 398 U.S. 144, 170–71 (1970) (explaining that racial discrimination by a private entity amounts to state action if compelled by the state). Justice Scalia in *Ricci* seemed to think that Title VII's disparate-impact provision was state action, whereas the Court in *Adickes* seemed to hold the private entity's act of state-compelled discrimination was state action. This Note proceeds on the assumption that either or both explanations correctly explain why state-compelled private racial discrimination is unconstitutional. Thus, a private actor triggers strict scrutiny under the Equal Protection Clause when it differentiates on the basis of race under compulsion by Title VII or other law. This Note uses the terms "official act" and "state action" to refer to action by the state, including laws, and action compelled by the state.

[28] If an official act implicates a constitutional right, then the act is subject to a judicial test (*e.g.*, strict scrutiny) that determines whether the act violated that right. But if an act does not implicate such a right, then the act is not subject to any such test because an act cannot have violated a right it did not implicate. The right to equal protection is implicated when the government treats, or requires a private actor to treat, one group differently than another group. *See infra* Part III.A. (discussing the threshold requirements for making an equal protection claim); *see also supra* note 27 (explaining that the Equal Protection Clause applies to state actors, as well as private actors, operating at the behest of the state). When an act implicates equal protection, the act is subject to one of several tiers of scrutiny to determine if the act violated equal protection. *See supra* note 18 (providing an overview of the tiers of judicial scrutiny) & *infra* note 159 (discussing when various levels of judicial scrutiny apply). *See generally infra* Part III.B.2 (discussing the special type of review triggered when the motivating-factor test is used to determine an act's official purpose).

[29] Scholars sometimes use the term "step zero" to refer to the threshold step of determining whether a particular legal test is applicable. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006). I will refer to this first step as "step one" in order to avoid confusion that could arise from referring to the first step as "step zero," the second step as "step one," and so on.

[30] *See infra* Part III.A. *But see infra* note 54 (discussing one exception to this rule). Although scholars and judges often state that such an official act "classifies" people, this note tends to avoid that term. An act need not classify people in order to trigger equal-protection scrutiny. *See infra* note 54. Moreover, not every official act that technically classifies people triggers equal-protection scrutiny because those acts do not treat anyone differently than anyone else. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 505–06 (2003)

protection, which determines which level of scrutiny applies to an official act that triggers equal-protection scrutiny. In particular, Part III.B.1 explains how to prove the basis upon which an official act differentiates among people, and Part III.B.2 briefly discusses which levels of scrutiny correspond to an act's basis. Part IV applies those equal-protection principles in an employment context akin to *Ricci*. In particular, Part IV.A addresses when an employer triggers equal-protection scrutiny of any kind by taking an action to avoid a disparate impact, and Part IV.B discusses how to determine which level of scrutiny applies to that action. Although this Note does not address "step three"[31]—whether disparate-impact avoidance satisfies the applicable level of scrutiny—the conclusion briefly explains why disparate-impact doctrine is undesirable.

II. BACKGROUND ON TITLE VII'S DISPARATE-IMPACT DOCTRINE

Title VII of the Civil Rights Act of 1964, as amended, prohibits employers from discriminating on the basis of any of several protected traits: race, color, religion, sex, or national origin.[32] It prohibits two distinct types of discrimination.[33] The first and "most easily understood" type is disparate-treatment discrimination,[34] which is an intentional act of unfavorable treatment against a person because of that person's protected trait.[35] The second type is disparate-impact discrimination, which is an act that creates a disproportionate effect on the basis of any protected trait.[36] Disparate-impact liability can attach even without proof of an

---

(discussing the Census and other examples of classifications that do not trigger equal-protection scrutiny). Of course, segregation is a classification that treats people differently than one another in two respects: people of group A are not allowed to use facilities reserved for group B, and people of group B are not allowed to use facilities for people of group A. Thus, segregation triggers equal-protection scrutiny due to either of those differences in treatment. The notion that both groups are treated the same because each group is allowed to use its facilities, but not the other group's facilities, overlooks those two ways in which the groups are treated differently.

[31] *See infra* notes 52 ("Applying the correct level of scrutiny is the third step.") & 53 (explaining why "step three" is omitted from this Note's analysis).

[32] Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009). Other federal laws prohibit certain disparate treatment and disparate impact. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (Title VI of the Civil Rights Act of 1964); Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) (Age Discrimination in Employment Act). This Note focuses on Title VII, race, and the employment context because *Ricci* and the scholarship it inspired have that focus.

[33] *See Ricci*, 557 U.S. at 577–78.

[34] *Id.* at 557 (quotation marks omitted) (quoting Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)); *see also* 42 U.S.C. § 2000e–2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[35] *Ricci*, 557 U.S. at 577 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–986 (1988)).

[36] *See id.* at 578 (describing disparate impact discrimination as "a particular employment practice

employer's intent to cause the impact or otherwise discriminate on the basis of a protected trait.[37]

Title VII's disparate-impact doctrine uses a burden-shifting approach for proving and defending against liability. The plaintiff must first prove an employment policy, such as a test, had a disparate impact along the lines of a protected trait.[38] The Equal Employment Opportunity Commission generally regards an employment test as evincing a disparate impact if any group with a protected trait passes the test at a rate of less than 80 percent of the group with the highest rate of passage.[39] After the plaintiff makes such a *prima facie* showing of a disparate impact, the burden shifts to the employer to prove the employment policy in question is consistent with business necessity.[40] If the employer overcomes that burden, the burden then shifts back to the plaintiff to prove the employer refused to adopt an alternative policy that would have served the employer's legitimate needs and resulted in less disparate impact along the lines of a protected trait.[41]

III. HEIGHTENED EQUAL-PROTECTION SCRUTINY APPLIES TO AN OFFICIAL ACT THAT DIFFERENTIATES ON A SUSPECT BASIS

The Equal Protection Clause cannot mean that the government must always treat every person exactly like it treats everyone else.[42] Perhaps

---

that causes a disparate impact on the basis of race, color, religion, sex, or national origin").

[37] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.") (citations omitted); *See* Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). *See generally* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141 (2007) (arguing that mental state is irrelevant in a disparate-impact claim).

At least one federal judge has held that Title VII's disparate-impact provision prohibits only intentional discrimination partly because it prohibits discrimination, which necessarily is intentional. *See id.* at 1173 n.181 (quoting United States v. N.C., 914 F. Supp. 1257, 1265 (E.D.N.C. 1996)). Somewhat similarly, scholars have debated whether the disparate-impact doctrine should be viewed as merely a method of proving intentional discrimination in order to ensure disparate-impact remedies are constitutional. *See id.* at 1178 n.203, 1182–85 (discussing this view). Scholars also have debated whether subconscious discrimination is intentional or otherwise actionable. *See id.* at 1178 n.203; *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 532–35 (2003) (discussing this view); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010) (discussing whether unconscious discrimination is actionable). These issues are beyond the scope of this Note.

[38] *See* Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. § 2000e–2(k)(1)(A)(i)).

[39] *See id.* 586–87 (2009) (citing 29 C.F.R. § 1607.4(D) (2008)); *Watson,* 487 U.S. at 995–96 n.3 (plurality opinion). For example, in *Ricci*, a prima facie case of disparate-impact liability arose because 58.1% of Caucasians passed one test and 31.6% of African-Americans passed it, and 31.6 is less than 80% of 58.1 (i.e. less than 46.48). *Ricci*, 557 U.S. at 586–87.

[40] *Ricci*, 557 U.S. at 578 (citing 42 U.S.C. § 2000e–2(k)(1)(A)(i)).

[41] *Id.* (citing 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii) and (C)).

[42] *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 544 n.22, 546 n.29

the most obvious reason why is that every action or rule treats some people differently than others, in some respects.[43] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[44] Known as the principle of equality,[45] the view that likes should be treated alike dates back to ancient times.[46] The Supreme Court interpreted the Equal Protection Clause according to that principle shortly after the Fourteenth Amendment was ratified, more than a century ago.[47] The necessary inverse[48] of the principle of equality is that "the equal protection clause does not forbid discrimination with respect to things that are different."[49] Accordingly, the principle of equality is concerned with whether two people who are treated differently than each other are alike in ways relevant to their different treatment—in other words, whether two people's differences justify their different treatment.[50]

Determining whether the Equal Protection Clause allows or prohibits certain state action requires answering two initial questions.[51]

(1982) (asserting that "people who are alike" are not alike in every respect); *see infra* note 49.

[43] Romer v. Evans, 517 U.S. 620, 631 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.") (citations omitted). *See* Westen, *supra* note 42, at 575 ("every rule treats people alike in some respects and unalike in others") (internal citations omitted); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997) ("Most laws, of course—perhaps all—classify individuals one way or another.").

[44] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

[45] *See, e.g.*, Westen, *supra* note 42, at 537 (stating that the principle of equality is that likes should be treated alike)..

[46] *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286-87 (1991) (citing ARISTOTLE, ETHICA NICHOMACHEA bk. V.3, 1131a, 1131b (W. Ross trans. 1925)); Westen, *supra* note 42, at 542–43 (citations omitted).

[47] *See* Missouri v. Lewis, 101 U.S. 22, 31 (1879) (The Equal Protection Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."); *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286 n.28 (1991) (citing slightly later Supreme Court cases that viewed equal protection according to the principle of equality).

[48] *See* Westen, *supra* note 42, at 539–40 & n.8 (arguing that the principle of equality necessarily means that people who are unlike need not be treated alike).

[49] Puget Sound Power & Light Co. v. City of Seattle, Wash., 291 U.S. 619, 624 (1934). *See* Vacco v. Quill, 521 U.S. 793, 799 (1997) (The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.") (citing Plyler v. Doe, 457 U.S. 202, 216 (1982) ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'") (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940))). *See also* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (the right to equal protection "is not a demand that a statute necessarily apply equally to all persons") (citing *Tigner*, 310 U.S. at 147).

[50] *See* Westen, *supra* note 42, at 543–47, 576–77 n.136; Maureen B. Cavanaugh, *Towards A New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 421 (1994).

[51] Scholars and courts sometimes have clearly analyzed an equal-protection claim under a two-step process like the one in this Note. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 296–313 (2001). *See also* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 588–89 (1979) (finding the plaintiffs' showing of

First, when does state action implicate the Equal Protection Clause—when does state action treat one person differently than another? Second, what is the basis of the state action for treating those persons differently? The first question is a threshold issue for stating an equal-protection claim, and courts and commentators tend to overlook or wrongly analyze it.[52] This Note will answer both questions in turn.[53]

---

different treatment sufficient to state an equal-protection claim); *see id.* at 592–93 & n.40 (finding that the different treatment was not based on a suspect purpose and thus was subject to rational-basis scrutiny). *See also* Monterey Mech. Co. v. Wilson, 125 F.3d 702, 708–12 (9th Cir. 1997) (determining the law at issue implicated equal protection because it imposed different treatment); *id.* at 712–15 (determining that the different treatment was based on race and gender, so heightened scrutiny must apply to the law). "'The first step in equal protection analysis is to identify the [defendants'] classification of groups.' . . . To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people. . . . 'The next step . . . [is] to determine the level of scrutiny.' . . . Classifications based on race or national origin, such as those alleged here, are subject to strict scrutiny." Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995) (citations omitted).

[52] Sometimes courts do not explain whether they are deciding cases by answering the first or second question. For example, the Supreme Court once stated that the law at issue "does not embody a racial classification. It neither says nor implies that persons are to be treated differently on account of their race." Crawford v. Bd. of Educ. of City of L.A., 458 U.S. 527, 537 (1982) (footnote omitted). But the Court did not clearly explain whether it meant that the law did not differentiate among groups or, instead, that the law differentiated on some ground besides race. *See id.* at 537–45.

Similarly, some courts have conflated the two questions (*e.g.*, the first two steps) into one. "Analysis of an equal protection claim alleging an improper statutory classification involves two steps. Appellants must *first* show that the statute, either on its face or in the manner of its enforcement, results in members of a certain group being *treated differently* from other persons *based on membership in that group*." United States v. Lopez-Flores, 63 F.3d 1468, 1472 (9th Cir. 1995) (emphasis added) (citing Jones v. Helms, 452 U.S. 412, 423–24 (1981); Hernandez v. Texas, 347 U.S. 475, 479 (1954)). "Second, if it is demonstrated that a cognizable class is treated differently, the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified." *Id.* (citing Plyler v. Doe, 457 U.S. 202, 217–18 (1982)). Contrary to what the Ninth Circuit stated in *Lopez-Flores*, the first step consists of determining only the existence of different treatment. *See infra* Part III.A. If the first step is satisfied, the second step consists of determining the basis for the different treatment. *See infra* Part III.B. Applying the correct level of scrutiny is the third step. The Ninth Circuit has recognized these three distinct steps in some cases. *See supra* note 51.

[53] *Infra* Part III.A. answers the first question, and *infra* Part III.B. answers the second question. *Infra* Part IV applies the answers to these questions in the context of an employer's discarding of test results to avoid a racially-disparate impact. In particular, *infra* Part IV.A. explains when avoiding a disparate impact treats one person differently than another. *Infra* Part IV.B. explains when race is the basis for avoiding a disparate impact.

The final step in an equal-protection claim is determining whether different treatment is justified by applying a tier of equal-protection scrutiny. *See supra* note 52. This Note does not analyze whether an action taken to avoid a racially-disparate impact would satisfy the appropriate level of scrutiny. Several articles have analyzed that issue. *See* sources cited in *supra* note 19. Rather, this Note focuses solely on the first two steps: whether such an action implicates equal protection and, if so, which level of judicial scrutiny it triggers.

A. Step One: Different Treatment Is the Only Threshold Showing Required for Stating An Equal Protection Claim

Supreme Court practice reveals that the only required threshold for stating an equal-protection claim is that an official act treats one person differently than another.[54] Several cases suggest that this showing is easy to make. Essentially any case against the government could support an equal protection claim if framed in the correct way. A showing of different treatment[55] need not rise to the level of a deprivation of liberty or property protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[56] Although a law is immune from equal-protection review to the extent it does not differentiate,[57] it is subject to

---

[54] An act that classifies people into "identifiable group[s]" treats people differently and therefore implicates equal protection. *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008). An official act that does not classify people but nevertheless treats some people differently than others implicates equal protection under a "class-of-one" theory of equal protection. *See id.* That theory "presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review." *Id.* at 605. The class-of-one theory does not apply in the context of public employment. *Id.* An employment action taken to avoid a racially-disparate impact, such as discarding test results that were racially skewed, fits into the classification theory rather than the class-of-one theory. *See id.* (viewing the classification theory broadly enough to include a policy that prohibits employees from using narcotics and a policy that requires teachers to receive continuing education). *See also infra* notes 68 & 210 (discussing these two theories); *infra* Part IV.A. (arguing that an action taken to avoid a racially-disparate impact implicates equal protection).

[55] Technically, the showing is of different (i.e. uneven) treatment, not "unequal" treatment. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (explaining when "differential treatment" violates equal protection). The principle of equality determines whether different treatment is unequal treatment. *See supra* notes 44–49 and accompanying text (explaining the principle of equality). In practice, courts make that determination by applying one of the tiers of scrutiny. *See supra* note 18 and *infra* note 159 (discussing the tiers of scrutiny). Note that the equal protection clause "protect[s] *persons,* not *groups*." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Thus, where this Note refers to different treatment of groups, a group may consist of one or more persons. *But see infra* note 210 (discussing a limit on "class-of-one" equal-protection claims).

[56] *See infra* note 72 and accompanying text.

[57] For example, in one case the Supreme Court upheld a city's decision to close all public swimming pools to avoid a court order to racially desegregate them. Palmer v. Thompson, 403 U.S. 217, 218–19 (1971). Scholars expressed concern with this case because they viewed it as holding that lawmakers' motives are irrelevant in equal-protection cases. *See, e.g.*, Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108–10 (1989) (discussing scholarship that had this concern). But the Court did not hold that. Rather, the Court held that an official act does not implicate equal protection to the extent it does not differentiate, so there is no need to determine whether the motives behind the act would subject it to strict scrutiny if it implicated equal protection. *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 298 (2001). In other words, the plaintiffs failed to get past "step one," so proceeding to "step two" would be improper. *See Palmer*, 403 U.S. at 225 (the evidence shows "no state action affecting blacks differently from whites"); *id.* at 226 ("the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike"); *id.* ("Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'"); *id.* at 220 ("[T]his is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites

such review to the extent it does differentiate. Indeed, several U.S. Supreme Court cases show that a law that treats everyone alike in certain ways nevertheless implicates equal protection if it differentiates in at least one respect.[58]

---

and forcing the races to remain separate in recreational or educational activities."); *see also* Washington v. Davis, 426 U.S. 229, 243 (1976) ("The holding [in *Palmer*] was that the city was not overtly or covertly operating segregated pools and was extending *identical treatment* to both whites and Negroes." (emphasis added)).

Plaintiffs in *Palmer* could have gotten past "step one" if they argued the pool closures differentiated among city employees by depriving pool employees, but not other city employees, of jobs. But there was no plausible way to argue that such differentiation was race-based, so that argument would have likely failed under rational-basis scrutiny. Instead, the plaintiffs tried to trigger strict scrutiny by plausibly arguing the pool closures were race-based because they sought to prevent pool-goers from swimming with people of other races. But this argument failed to get past "step one" because the city did not treat any pool-goers differently than any other pool-goers.

See also United States v. Armstrong, 517 U.S. 456, 470-71 (1996) (selective-prosecution claim failed to implicate equal protection because it failed to identify any persons who could have been, but were not, prosecuted for the same offense); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997) ("Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.").

[58] Professor Rebecca L. Brown has noted that the Supreme Court struck down a poll tax on equal protection grounds for discriminating against African Americans, although the law facially applied to everyone. *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1542–43 (2002). She then argued that there should be a principled way to distinguish that law from a law imposing a generally applicable speed limit, which should not implicate equal protection. *See id.* If a speed limit implicated equal protection, "[i]t would strain the nobility of the equality principle, not to mention the resources of the federal judiciary, if every such inequality of impact were cognizable based on the different ways that a general law might fall on different people." *Id.* at 1542 (citing Emp't Div. v. Smith, 494 U.S. 872, 878 (1990); Washington v. Davis, 426 U.S. 229, 246-47 (1976)).

However, the principled way to distinguish those two laws is not to decide that only one implicates equal protection; rather, it is to decide that only one triggers heightened scrutiny. Strict scrutiny should apply to a poll tax because it burdens the fundamental right to vote, *see infra* note 74, and because it discriminates against African Americans. By contrast, the speed limit would easily satisfy rational-basis scrutiny. *See infra* Part III.B.2; *see infra* note 208 and accompanying text. Simply put, different treatment implicates, but does not necessarily violate, the right to equal protection. And essentially every official act treats people differently in one way or another.

According to Professor Brown, the *Davis* Court was wary of thinking that every law *implicated* equal protection because such a practice would call into question the validity of many laws. *See id.* at 1542 n.258 (citing *Davis*, 426 U.S. at 248). To the contrary, the *Davis* Court was concerned with finding every law to be *race-based* solely because it had an uneven racial impact, because such a finding would *trigger strict scrutiny* and thereby call into question most laws. *Davis*, 426 U.S. at 248 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent *compelling* justification, if in practice it benefits or burdens one *race* more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes[.]") (emphasis added); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979).

Moreover, both upholding a speed limit and striking down a poll tax are consistent with the equality principle. *See supra* notes 44–49 and accompanying text (discussing the equality principle). As for poll taxes, the races are similarly situated and people of varying degrees of affluence are similarly situated with respect to ability to vote competently, so the equality principle demands like treatment among the races and among all levels of affluence with respect to voting. By contrast, motorists that drive at an unsafely high speed are not like motorists that drive at a safe, slower speed, and thus

The first illustrative case is *Vacco v. Quill*[59], in which the Supreme Court upheld New York's ban on physician-assisted suicide.[60] New York law allowed physicians to remove life support from terminally-ill patients.[61] The Court noted that New York's ban on assisting suicide and its laws permitting patients to refuse medical treatment do not facially "treat anyone differently from anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide."[62] Despite this apparent similar treatment, the Court explored the equal-protection argument due to clever framing. A lower court ruled that the statutes treated people differently because "some terminally ill people—those who are on life-support systems—are treated differently from those who are not, in that the former may 'hasten death' by ending treatment, but the latter may not 'hasten death' through physician-assisted suicide."[63] This framing sufficed to state an equal-protection claim.[64]

Another example is *New York City Transit Authority v. Beazer*. In that case, the Supreme Court upheld a Transit Authority policy that excluded users of narcotics, including people receiving methadone treatment, from being considered for employment.[65] The Court stated that "[g]eneral rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with" the Equal Protection Clause.[66] "Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether [the Equal Protection Clause] is violated arise."[67] Thus, different treatment is sufficient to implicate equal protection.[68] The Transit Authority policy at issue "places a meaningful restriction on all of its employees and job applicants; in that sense the rule is one of general applicability and satisfies the equal protection

---

treating them differently is permissible under the equality principle.

[59] Vacco v. Quill, 521 U.S. 793 (1997).

[60] Vacco v. Quill, 521 U.S. 793, 808–09 (1997).

[61] *Id.* at 796–97.

[62] *Id.* at 800.

[63] *Id.*

[64] *See id.* at 800–09.

[65] N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 570–71 (1979). *See id.* at 573–74 (stating methadone has lawful uses, including as a painkiller and a means of curing a heroin addiction).

[66] *Id.* at 587.

[67] *Id.* at 587–88.

[68] *See* Engquist v. Oregon Dep't of Agr., 553 U.S. 591, 605 (2008) ("[T]he Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently") (citing New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199–201 (1979); Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 314-17 (1976)). Thus, the policy at issue in *Beazer* fit into the classification theory, rather than class-of-one theory, of equal protection. *See supra* note 54 & *infra* note 210 (discussing these two theories).

principle without further inquiry."[69] But the Court engaged in further inquiry because a court below ruled that the policy treated methadone users differently than people who do not use narcotics, including methadone.[70] This case shows how framing can turn almost any grievance against the government into an equal-protection claim,[71] even if the claim falls short of implicating the right to due process.[72]

In *Zablocki v. Redhail*, the law at issue forbade anyone from marrying who owed child support to children outside of his or her custody.[73] The Court applied strict scrutiny to the law because it infringed on the fundamental right to marry[74] and thereby struck down the law under the Equal Protection Clause.[75] Justice Potter Stewart criticized the Court's decision to rely on equal protection instead of substantive due process.[76] "Like almost any law, the [marriage-requirement] statute now before us affects some people and does not affect others. But to say that it thereby creates 'classifications' in the equal protection sense strikes me as little short of fantasy."[77] Rather, Justice Stewart believed that the Equal Protection Clause guards against only "invidiously discriminatory classifications," of which the

---

[69] *Beazer*, 440 U.S. at 588.

[70] *Id.*

[71] This means that the equal protection clause is implicated and that an appropriate level of scrutiny should apply; this does not mean that the clause is necessarily violated. *See supra* note 18 (referring to an overview of the tiers of judicial scrutiny provided by City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985).

[72] The job applicants that filed the lawsuit in *Beazer* certainly did not have a due process right to be considered for employment. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.38 (1979) (the applicants abandoned their due process argument before the Supreme Court, which found "no merit" in the argument); *see also* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 575, 578 (1972) (terminating an at-will public employee without a hearing or an explanation does not implicate the right to due process).

[73] Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

[74] *Zablocki*, 434 U.S. at 383. Under the Supreme Court's equal protection jurisprudence, strict scrutiny applies to an official act that targets a suspect class or burdens a fundamental right. *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 253–54, 263 (1974) (stating that saving taxpayer money is not a sufficient state interest to sustain durational residence requirements that inhibit individuals' right to freely migrate); *See also* Romer v. Evans, 517 U.S. 620, 631 (1996) ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). This fundamental-rights aspect of equal protection can be called "substantive equal protection." *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1500–12 (2002) (discussing this doctrine). Although the Court could have relied on substantive due process in its "substantive equal protection" cases, it relied on equal protection instead because its substantive due process jurisprudence is criticized more often than its equal protection jurisprudence. *See generally id.*; Carlos A. Ball, *Why Liberty Judicial Review Is As Legitimate As Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011). Substantive equal protection is beyond the scope of this Note.

[75] Zablocki v. Redhail, 434 U.S. 374, 382 (1978).

[76] *Zablocki*, 434 U.S. at 91 (Stewart, J., concurring in the judgment). Substantive due process is beyond the scope of this Note.

[77] *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment). For a discussion of dissenting Justices in other cases who shared Justice Stewart's narrower view of equal protection, *see* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1511 (2002).

"paradigm" example is a racial classification.[78] The flaw with Justice Stewart's narrow view of when an act implicates equal protection is that his logic does not support his conclusion. Using Justice Stewart's logic, if the marriage law at issue passed muster under equal protection, it would be because the law did not invidiously discriminate and thus satisfied rational-basis scrutiny.[79] It would not be because the law failed to classify and thus failed to implicate equal protection.[80] In other words, Justice Stewart seemed to conflate the first and second steps of an equal-protection claim.[81] Indeed, the other eight Justices thought the law implicated equal protection,[82] and Justice Stewart, somewhat inconsistently, had written an earlier majority opinion relying on equal protection in a similar case.[83]

A litigant need not show that he or she is similarly situated with other persons in order to state an equal-protection claim.[84] Instead,

---

[78] *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment).

[79] *See infra* notes 208–11 (explaining the constructs surrounding the various levels of judicial scrutiny).

[80] If a law denies to people of one race, but not other races, the right to marry, then it certainly treats two groups differently (i.e., it "classifies"). The law at issue in *Zablocki* denied to one group, but not others, the right to marry. Thus, that law implicated equal protection just like the hypothetical racial law does. The important difference between these two laws is that the racial law triggers strict scrutiny because it is race-based, whereas the law in *Zablocki* would not necessarily trigger strict scrutiny. *See Zablocki*, 434 U.S. at 383–84 (majority opinion) (explaining that although the law does not classify by race, it is subject to strict scrutiny because it burdens the fundamental right to marry); *see also supra* note 58 (arguing that the tiers of scrutiny are the most principled way to distinguish laws that violate equal protection from those that do not).

[81] *See infra* Part III.B (discussing the second step of an equal-protection claim).

[82] *See Zablocki*, 434 U.S. at 382 (majority opinion) (relying on equal protection clause); *id.* at 391 (Burger, C.J., concurring) (stating that he joined the majority opinion); *id.* at 400 (Powell, J., concurring in the judgment) (stating that the law is unconstitutional under either equal protection or substantive due process); *id.* at 406 (Stevens, J., concurring in the judgment) (relying on equal protection); *id.* at 407 (Rehnquist, J., dissenting) (arguing the law should be upheld under rational-basis scrutiny under equal protection and substantive due process).

[83] *See* Carrington v. Rash, 380 U.S. 89 (1965). That case involved a "substantive equal protection" claim, *see supra* note 74, that challenged a Texas law that forbade military members stationed there from voting there. *Id.* at 89–90. According to Justice Stewart's majority opinion, the law treated military members and non-military members differently. *See id.* at 91–93. But in *Zablocki*, he thought the marriage-license requirements did not impose different treatment. *See Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment).

[84] *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011) (arguing that "similarly situated" analysis is not a preliminary hurdle that litigants must clear to proceed to equal protection review). Of course, the litigant must *allege* that he or she is similarly situated with differently-treated persons in order to state an equal protection claim. *See* Engquist v. Oregon Dep't of Agr., 553 U.S. 591, 601–02 (2008) (in Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000), the Court held the "complaint stated a valid claim under the Equal Protection Clause because it *alleged* that [the plaintiff] had 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment'" (emphasis added)); *id.* at 602 ("When those who *appear* similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference[.]" (emphasis added)). *See also* Samaad v. City of Dallas, 940 F.2d 925, 941–42 (5th Cir. 1991) (stating that litigant failed to state an equal protection claim by failing to allege being similarly situated with differently-treated persons). The Eighth Circuit misinterpreted *Samaad* to require a litigant to show, rather than merely allege, he was similarly situated with others. *See infra* note 88 (exemplifying that some circuit courts have held that a court must decide whether two groups are similarly situated in order to determine whether equal protection is implicated). Requiring such an *allegation* makes sense because "similarly situated" is part of the definition of "equal," *see supra* notes 44–49 and accompanying text, so failing to allege

whether two groups are similarly situated is a conclusion that a court reaches by applying a proper level of equal-protection scrutiny.[85] Specifically, equal-protection scrutiny determines whether the groups are similar in ways relevant to their different treatment—in other words, whether distinctions between two groups justify the groups' different treatment.[86] Hence, justifying race-based different treatment is much more difficult than justifying age-based different treatment because racial groups, but not age groups, are strongly assumed to be similarly situated.[87] Some circuit courts have held that a court must decide

---

being similarly situated would fail to allege that the different treatment in question is *unequal* treatment.

[85] *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011) (arguing that "similarly situated" analysis is not a preliminary hurdle that litigants must clear to proceed to equal protection review); Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating that the legislature makes the initial determination as to "what is 'different' and what is 'the same'" when it classifies people, and courts review whether that determination is correct by applying a level of equal-protection scrutiny, most often rational-basis scrutiny). True, equality means nothing without a notion of being similarly situated. *See supra* notes 44–49 and accompanying text (describing the principle of equality). But that truism does not explain which party bears the burden of establishing whether two groups are similarly situated and when a party must establish that. Because the issue of being similarly situated is relevant only during application of a tier of judicial scrutiny, the equal-protection claimant essentially needs to prove the groups in question are similarly situated if rational-basis scrutiny applies. *See infra* note 159 (clarifying that when heightened scrutiny applies, the government essentially needs to prove the groups in question are not similarly situated).

Courts have failed to understand this. *See* Silveira v. Lockyer, 312 F.3d 1052, 1088 (9th Cir. 2002), *abrogated on other grounds by* District of Columbia, 554 U.S. 570 (2008), ("[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately") (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)) (other citations omitted). The Ninth Circuit would have been correct if it omitted the words "similarly situated" from that quote. When the state treats similarly-situated persons differently, it does not merely trigger equal-protection review. Instead, the state violates equal protection. *Cleburne*, 473 U.S. at 439 (stating that the equal protection clause is "a direction that all persons similarly situated should be treated alike") (citing *Plyler*, 457 U.S. at 216); *Plyler*, 457 U.S. at 216 ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'") (citation omitted); *see supra* notes 44–50 and accompanying text (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny).

[86] Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 615 (2011) ("'[S]imilarly situated' analysis is relational. Its focus is not merely pointing out any difference between the two classes, but rather evaluating the relationship between the classification and the statutory purpose.") (citations omitted); *id.* at 619 (arguing that instead of "focusing on differences between two groups," the "similarly situated" analysis focuses on "the statutory aims and the 'fit' between the legislative classification and these asserted goals"). *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 546 n.29 ("'Equals . . . ought to be treated alike in the respect in which they are equal; but there may be other respects in which they differ . . . which justify differences in treatment.'") (quoting S. BENN & R. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 124 (1959)); In re Antazo, 3 Cal. 3d 100, 110, 473 P.2d 999, 1005 (1970) ("the 'concept of the equal protection of the laws compels recognition of the proposition that persons *similarly situated with respect to the legitimate purpose of the law* receive like treatment'") (emphasis added) (citation omitted). *See also supra* text accompanying *supra* note 50.

[87] There is a direct correlation between (1) the strength of the assumption that two groups are similarly situated and (2) how difficult to justify different treatment between those groups is. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985) (explaining that suspect classifications such as race are "seldom relevant" to state interests, quasi-suspect classifications such as gender "frequently bear[] no relation" to state interests, and non-suspect classifications are often relevant to state interests; explaining the tiers of scrutiny that apply to these three classifications). *See also* Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 478 (1981) (Stewart, J., concurring) ("[S]o far as the Constitution is concerned, people of different races

whether two groups are similarly situated in order to determine whether to apply any such scrutiny—that is, to determine whether equal protection is implicated.[88] However, some of those same circuit courts have held to the contrary,[89] and courts in other circuits apparently have

---

are always similarly situated") (citations omitted); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns[.]"); Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 614 (2011) ("The phrase 'similarly situated' appears less in race cases because the Court is less willing to entertain the claim that racial line-drawing is legitimate, no matter the asserted justification.") (citations omitted).

[88] Harvey v. Town of Merrillville, 649 F.3d 526, 531 (7th Cir. 2011) (holding that to state an equal-protection claim, claimants "need[] to come forward with evidence from which a jury could conclude (1) they were members of a protected class; (2) they were similarly situated to members of an unprotected class in all relevant respects; and (3) they were treated differently from members of the unprotected class") (citation omitted); Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994), ("Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.") (citing Samaad v. City of Dallas, 940 F.2d 925, 941 (5th Cir. 1991)); Griffith v. Johnston, 899 F.2d 1427, 1441 (5th Cir. 1990) ("Adopted children who rely upon their adoptive parents for support and children under state conservatoires, are in no way similarly situated with regard to the medical and psychological services provided by the state. The state has no responsibility to treat these disparately situated children identically. Appellants have failed to state an Equal Protection cause of action."); Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996) (stating that because female-inmate plaintiffs failed to prove they are similarly situated with better-treated male inmates, "[t]he female inmates . . . are, therefore, foreclosed from making an equal protection challenge"); *Women Prisoners*, 93 F.3d at 951 (Rogers, J., concurring in part and dissenting in part) ("Rather than examine whether the District can justify its separate and unequal treatment of the sexes . . . the court concludes that . . . equal protection principles do not even apply: these two identical prisoners are not 'similarly situated.'"); *Harvey*, 649 F.3d at 531–32; Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595, 604 (2007) ("The *Klinger* court held that because the prisoners were not similarly situated, there could be no equal protection violation. The court did not analyze the program using any level of scrutiny—strict, intermediate, or rational basis—to determine whether the program violated the Equal Protection Clause and to ensure that the women were free from illegal gender discrimination.").

[89] The Eighth Circuit held this view two days before it took a different view in *Klinger*. Bills v. Dahm, 32 F.3d 333, 336 (8th Cir. 1994) ("Where men and women are found not to be similarly situated, the court must still determine whether" [their different treatment in a prison setting] "was rationally related to a permissible state objective.") *See also* Timm v. Gunter, 917 F.2d 1093, 1102–03 (8th Cir. 1990) (explaining that rational-basis scrutiny is satisfied because the differently treated groups are not similarly situated); Oliver v. Scott, 276 F.3d 736, 746–47 (5th Cir. 2002) (parroting the holding of *Timm*).

However, the court in *Bills* erred because the state satisfies equal protection if it treats different groups differently. *See* text accompanying *supra* notes 44–50 (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny). Equal-protection scrutiny determines if groups are similar or different. *See id.* The Eighth Circuit failed to recognize this point in both *Klinger* and *Bills*, although the court in those cases took opposing views as to whether rational-basis scrutiny applies after a court decides the groups are different. The Eighth Circuit failed to recognize this point in both *Klinger* and *Bills*, although the court in those cases took opposing views as to whether rational-basis scrutiny applies after a court decides the groups are different. *See* Bills v. Dahm, 32 F.3d 333, 336 (8th Cir. 1994) (applying rational-basis scrutiny even after concluding that the men and women were not similarly situated); Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595, 604 (2007) (explaining that the *Klinger* court refused to apply any level of scrutiny once it concluded that the female inmates and male inmates were not similarly situated).

as well.[90] Supreme Court practice shows that the issue of being similarly situated is relevant only during application of a level of scrutiny, not as a threshold requirement to state an equal-protection claim.[91] A contrary view could circumvent the heightened scrutiny that applies to gender[92] and race[93] discrimination, thereby allowing such discrimination to continue.[94] Indeed, such a view makes no sense because once an equal-protection claimant has shown the official act in question treats similarly-situated persons differently, the claimant has shown the act violated equal protection, thereby rendering unnecessary any application of judicial scrutiny.[95]

---

[90] *See* United States. v. Lopez-Flores, 63 F.3d 1468, 1472 (9th Cir. 1995) (explaining how to state an equal-protection claim, without any reference to a showing of being similarly situated); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 708–12 (9th Cir. 1997) (analyzing whether the law at issue implicated equal protection, without considering whether the differently -treated groups were similarly situated); Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995) ("Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared.") (citation omitted).

[91] *See* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 608–12, 616-19 (2011) (describing several U.S. Supreme Court cases where the "similarly situated" issue was relevant during application of a tier of equal-protection scrutiny, not as a threshold requirement in order to proceed to such scrutiny).

[92] *See* Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"* 51 N.Y.L. SCH. L. REV. 595, 612 n.115 (2007) (explaining that the court in Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996), recognized that it would have subjected the challenged state action to heightened scrutiny if the differently-treated sexes were similarly situated).

[93] *See supra* note 87 (describing race as a suspect classification and gender as a quasi-suspect classification, both of which mandate heightened scrutiny)..

[94] *See* Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated."* 51 N.Y.L. Sch. L. Rev. 595, 617 (2007) ("Like other cases in which the court addresses equal protection claims without a detailed analysis of whether groups are similarly situated, women prisoners should also have their equal protection claims addressed to ensure that they are free from illegal gender discrimination."); *see also* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 592–93 (2011) (discussing this view). *See also supra* note 87 (describing race as a suspect classification and gender as a quasi-suspect classification, both of which mandate heightened scrutiny).

[95] The state violates equal protection when it treats similarly-situated persons differently. *See supra* notes 44–50 and accompanying text (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny). That is all the equal protection clause means, and that meaning has been settled for a very long time. *See id.* Failure to understand that basic meaning of equal protection has led courts to write such senseless statements as: "Even if the challenger can show that the classification differently affects similarly situated groups, '[i]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest,' the classification is upheld unless it bears no rational relationship to a legitimate state purpose." People v. Ranscht, 173 Cal. App. 4th 1369, 1372, 93 Cal. Rptr. 3d 800, 802 (2009) (citing Weber v. City Council of Thousand Oaks, 9 Cal.3d 950, 958–59 (1973)). Upholding a law that a plaintiff has proved "differently affects similarly situated groups" would be directly contrary to the core meaning of equal protection, which is that the state may not treat similarly-situated groups differently. *See supra* notes 44–50 and accompanying text (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny).

B. Step Two: Determining Which Level of Scrutiny Applies

The previous section explained how to state an equal-protection claim and explained that a court's first step in reviewing such a claim is determining whether state action differently treated two groups.[96] The previous section did not discuss how a court would likely rule on the merits of the claim, which is the focus of the second step of an equal-protection claim.[97] The second step is the focus of the present section and has two components: determining if an official act is based on a suspect or quasi-suspect purpose,[98] and determining which level of scrutiny corresponds to that purpose.[99]

1. *Determining an Official Act's Purpose*

To rule on the merits of a claim, a court must determine whether an act has a suspect or quasi-suspect purpose, and an act can have multiple purposes.[100] If an act has multiple purposes and at least one of them is quasi-suspect or suspect, the level of scrutiny that applies to the act will correspond to the most suspect purpose.[101] For example, if an act has a racial purpose, then heightened scrutiny would apply to the act, regardless of the act's non-racial purposes.[102] An act purposely treats two groups differently if the actor decided to perform the act "at least in part 'because of,' not merely 'in spite of,'" its effect on one or both of those groups.[103]

There are at least four ways to determine whether an act purposely treats two groups differently: (1) the act's express purpose, (2) the act's impact alone, (3) a motivating factor behind the act, and (4) and the

---

[96] A plaintiff who fails to show different treatment not only fails to state an equal-protection claim, but the plaintiff also fails to establish its standing to bring that claim. *See* Ne. Fla Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993). Standing doctrine and procedural rules regarding motions to dismiss and the like are beyond the scope of this Note.

[97] *See supra* note 51 (stating that scholars and courts sometimes analyze equal-protection claims under a two-step process like the one in this Note).

[98] *See infra* Part III.B.1 (explaining that the second step in analyzing equal-protection claims involves determining if an official act is based on a suspect or quasi-suspect purpose and determining which level of scrutiny corresponds to that purpose).

[99] *See infra* Part III.B.2. (explaining how courts determine which level of scrutiny applies to an equal-protection claim).

[100] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977). *See generally* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (determining whether a law that purposely provides a hiring preference for veterans also purposely imposes a burden on females).

[101] *See Arlington Heights*, 429 U.S. at 265–66 (pointing out that "judicial deference is no longer justified" when there is proof of racial discrimination).

[102] *See id. See infra* Part III.B.2. for a discussion of tiers of scrutiny.

[103] *Feeney*, 442 U.S. at 279.

predominant factor behind the act.

a. Express Purpose Shown by a Writing or an Admission

One way to determine one of an official act's purposes is to determine if the act expressly imposes different treatment. If so, no further inquiry into that purpose of the act is necessary.[104] The most obvious example is a written policy, such as a statute or an administrative guideline that facially imposes different treatment on the basis of race.[105] Additionally, an action can expressly treat two groups differently even if the purpose is not expressed in writing. For example, an unwritten policy to segregate prison inmates by race is expressly based on race, at least if the prison officials admit to the existence of the policy.[106] For an act that does not expressly impose different treatment, there are other ways to determine the act's purpose [107] In such a case, a deeper inquiry into the purposes behind the act is necessary.

b. Showing an Act's Purpose by Showing Its Impact

Impact alone is a second way to determine one of an official act's purposes.[108] In "rare" cases, an official act's uneven impact will be "stark" enough to prove the act's purpose.[109] In such a case, the evidentiary inquiry is relatively easy, and inquiry into factors besides impact will be unnecessary.[110] An act's starkly-uneven impact proves the

---

[104] Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (citing Shaw v. Reno, 509 U.S. 630, 642 (1993)); Wayte v. United States, 470 U.S. 598, 608 n.10 (1985) (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

[105] *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (discussing a federal statute that required federal contractors to presume racial minorities are socially and economically disadvantaged individuals and that provided a benefit to contractors for sub-contracting with such individuals); Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that a public university's written admission guidelines favorably viewed an applicant's status of belonging to a particular race).

[106] *See* Johnson v. California, 543 U.S. 499, 502–03, 508–09 (2005) (holding that strict scrutiny should have been applied to the California Department of Corrections's unwritten policy of segregating prisoners by race.).

[107] Such an act is often said to be a "facially neutral" act. *See, e.g.*, Feeney, 442 U.S.at 283 (Marshall, J., dissenting).

[108] In such a situation, the equal protection violation is the act's presumed purpose, not the stark imbalance, although the imbalance is the sole reason for the presumption. Miller v. Johnson, 515 U.S. 900, 913 (1995) ("Even in [*Yick Wo* and *Gomillion*], however, it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation.").

[109] Vill. of Arlington Heights, v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266. (1977). This Note will refer to this method of proving an act's purpose as the impact-alone test.

[110] *Id.*

act had a particular purpose only if the impact is unexplainable on any ground besides that purpose.[111] Therefore, the impact-alone test has two prongs that must be satisfied to prove a particular purpose (*e.g.*, racial discrimination): starkly-uneven impact along a particular line (*e.g.*, race) and a negation of any other purpose (*e.g.*, a non-racial purpose).[112]

Seminal examples of cases where impact alone proved intent include *Guinn v. United States*, *Lane v. Wilson*, *Yick Wo v. Hopkins*, and *Gomillion v. Lightfoot*.[113] In *Guinn*, the Supreme Court invalidated an Oklahoma law that imposed a literacy requirement on voters because it exempted voters whose ancestors were able to vote before the ratification of the Fifteenth Amendment, which forbids race-based denial of the right to vote.[114] In *Lane*, the Court struck down a law that Oklahoma enacted to circumvent *Guinn* by forever disenfranchising anyone who was unable to vote pre-*Guinn* and who failed to register to vote within a twelve-day window post-*Guinn*.[115] In *Yick Wo*, San Francisco granted laundry-business permits to all but one of the Caucasian applicants and to no Chinese applicants; this was race-based discrimination because both racial groups complied with the permit requirements and officials gave

---

[111] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979).

[112] *See Arlington Heights*, 429 U.S. at 266 (noting that some cases exist in which the motivating factor behind an official action cannot be explained by any grounds other than race); *Feeney*, 442 U.S. at 274–75. The Court in *Feeney* was unclear as to what burden of proof the equal-protection claimant bears under the impact-alone test's first prong. The *Feeney* Court was also unclear as to whether the second prong requires an equal-protection claimant to negate possible innocent explanations for a disparity or whether the opposing party must provide an innocent explanation. Cases challenging the jury-venire selection process might resolve these issues. In a challenge to a jury-venire selection process, the first prong requires the equal-protection claimant to make a *prima facie* case of intentional discrimination. Washington v. Davis, 426 U.S. 229, 241 (1976). A higher burden of proof might apply in other contexts because a disparity can satisfy the first prong in the jury-venire context although the disparity would be insufficiently stark to satisfy this prong in other contexts. *See infra* note 132. However, that fact probably simply means that the first prong uses a *prima facie* standard in every context, and that standard is satisfied more easily in a jury-venire context than in other contexts. After the claimant satisfies the first prong, the second prong shifts the burden of production to the opposing party to produce an innocent explanation for the disparity. *Davis*, 426 U.S. at 241. The jury-venire cases are part of the impact-alone doctrine, so the burdens of proof used therein would likely apply to any impact-alone case. *See* McCleskey v. Kemp, 481 U.S. 279, 293–94 & n.12 (1987) (noting that cases challenging jury-venire selection are part of the impact-alone doctrine); *Arlington Heights*, 429 U.S. at 266 n.13 (same). Indeed, these burdens of proof are the standard for proving intentional discrimination because they also apply to Title VII disparate-treatment cases and equal-protection cases challenging petit-jury selection. *See* Johnson v. California, 545 U.S. 162, 168, 170–71, n.7, 173 (2005). Although the second prong places the burden of production on the party defending against the equal-protection claim, the claimant always bears the burden of persuasion—at least in cases challenging petit-jury selection. *Id.* at 170–71. *See infra* Part IV.B.2.d. for an application of these two prongs in the context of an employer's discarding of test results to avoid a racially-disparate impact.

[113] *See Arlington Heights*, 429 U.S. at 266 (citing these cases for the proposition that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect if the state action, even when the governing legislation appears neutral on its face"); *Feeney*, 442 U.S. at 272 (citing these cases for the proposition that some ostensibly neutral classifications are obvious pretexts for racial discrimination).

[114] Guinn v. United States, 238 U.S. 347, 357, 363 (1915).

[115] Lane v. Wilson, 307 U.S. 268, 275–76 (1939).

no reason for the different treatment.[116] In *Gomillion*, a city engaged in race-based action when it changed its political boundary from a square to a "strangely irregular twenty-eight-sided figure" that removed 395 of 400 African-American voters and no Caucasian voters from the city.[117] In all four of these cases, the Supreme Court held the state action at issue was race-based because the "stark" racial disparity was unexplainable on any ground besides race,[118] or, in other words, was "an obvious pretext for racial discrimination."[119]

Those rare cases might add some confusion to the distinction between impact and purpose.[120] The Supreme Court has seemed inconsistent by asserting that uneven impact alone cannot violate the Equal Protection Clause[121] while also asserting that impact can reveal racially-disparate purposes.[122] The reconciliation of those two assertions is that the Equal Protection Clause forbids, for example, racially-uneven impacts only if they are intentional,[123] and that intent can be proven by impact alone in few rare situations.[124] This is why Justice John Paul Stevens argued that, "when the disproportion is as dramatic as in [*Gomillion*] or [*Yick Wo*], it really does not matter whether the standard is phrased in terms of purpose or effect."[125] He further argued "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[126] He agreed, though, that not every

---

[116] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).)

[117] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Although the majority decided *Gomillion* under the Fifteenth Amendment, subsequent decisions suggest that Justice Charles Evans Whittaker's concurring opinion correctly relied on the equal protection clause of the Fourteenth Amendment. Shaw v. Reno, 509 U.S. 630, 645 (1993).

[118] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

[119] Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

[120] *See* City of Mobile v. Bolden, 446 U.S. 55, 130 (1980) (Marshall, J., dissenting) (arguing that, contrary to the plurality's opinion, previous case law is not clear as to whether "proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim.").

[121] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny[.]") (citation omitted); *Arlington Heights*, 429 U.S. at 264–65 (noting *Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially-disproportionate impact").

[122] *See Feeney*, 442 U.S. at 275 ("[T]here are cases in which impact alone can unmask an invidious classification.") (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)); *Arlington Heights*, 429 U.S. at 266) ("Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative[.]") (footnote omitted).

[123] Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially-discriminatory purpose, is unconstitutional solely because it has a racially-disproportionate impact"); *Arlington Heights*, 429 U.S. at 264-65 (noting *Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially-disproportionate impact"); *Feeney*, 442 U.S. at 272 ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

[124] *See supra* note 108.

[125] Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

[126] *Id.*

disproportionate impact will prove a discriminatory purpose.[127]

c. Showing Purpose by Showing a Motivating Factor

A third way to prove an act's purpose is to prove that a purported purpose was a motivating factor behind the act.[128] A motivating factor need not be the sole or primary factor behind an act.[129] As the Supreme Court explained in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, this inquiry considers all relevant factors, including the act's impact and historical background.[130] Often, the impact is an "important starting point."[131] But impact is not synonymous with purpose. If a disparity is not extreme like in *Yick Wo* and similar cases, then the disparity will be evidence, not proof, of purpose.[132] Again, a court should hold that an official act was based on race, for example, only if the act purposely treats races differently.[133] Therefore, if an official act has an *unintended* racially-disproportionate impact, the act is not based on race.[134]

In several Supreme Court cases, disproportionate impacts were insufficient to prove discriminatory intent.[135] For example, the plaintiff

---

[127] *Id.*

[128] *See Arlington Heights*, at 265–66..

[129] *Arlington Heights*, 429 U.S. at 265.

[130] *Arlington Heights*, 429 U.S. at 266–68 . The Court stated that the following non-exhaustive list of factors might be relevant: (1) the impact of the official act, (2) "[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes," (3) "[d]epartures from the normal procedural sequence," (4) "[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and (5) the "legislative or administrative history." *Id.* at 266–68. This Note will refer to an analysis that uses these factors as the "*Arlington Heights* framework."

[131] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Pers. Adm'r of Mass.Massachusetts v. Feeney, 442 U.S. 256, 274 (1979) (citing *Arlington Heights*, 429 U.S. at 266) (stating "impact provides an 'important starting point'").

[132] *See* Arlington Heights,, 429 U.S. at 266; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979). A disparity less extreme than in cases such as *Yick Wo* can prove intent in cases challenging the selection of jury venires. *See* McCleskey v. Kemp, 481 U.S. 279, 293–94 (1987); Arlington Heights, 429 U.S. at 266 n.13.

[133] *See supra* note 123.

[134] *See* Arlington Heights, 429 U.S. at 270–71(holding that a policy with discriminatory consequences is not enough to pose "constitutional significance"—proof of a discriminatory purpose is necessary).

[135] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (concluding that "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted *because* it would accomplish the collateral goal of keeping women in a stereotypic and predefined place . . . .") (emphasis added); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) ("Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."); Washington v. Davis, 426 U.S. 229, 246 (1976) ("Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants.").

in *Personnel Administrator of Massachusetts v. Feeney* argued that a Massachusetts law imposed different treatment based on gender.[136] The law facially created a hiring preference for veterans in civil service jobs,[137] which accounted for roughly 60 percent of all public-sector jobs in the state.[138] When the lawsuit started, 98 percent of veterans in the state were male, and more than a quarter of the state's residents were veterans.[139] The plaintiff reasoned that military-hiring policies heavily favored men, the disparate effects of the law at issue were foreseeable, and the law provided a lifelong hiring preference unrelated to job qualifications.[140] The Court held this insufficient to prove gender-based discrimination because the hiring preference burdened non-veterans regardless of gender, and the legislature enacted the law in spite of, not because of, the uneven effect on women.[141]

d. Showing an Act's Purpose by Showing Its Predominant Factor

Proving the predominant factor behind an official act is a fourth way to prove a purpose of the act.[142] To be predominant, a factor must be controlling[143] and all other factors must be subordinate to it.[144] A factor can be predominant without being the only factor behind an act.[145] A predominant factor can be shown through direct and circumstantial evidence under the *Arlington Heights* framework, which considers such

---

[136] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 259 (1979).

[137] *Id.* at 259.

[138] *Id.* at 261–62.

[139] *Id.* at 270. Between 1963 and 1973, 43% of civil service jobs in the state went to females and the other 57% to males. *Id.* About 2% of those women hired were veterans, whereas 54% of those men hired were veterans. *Id.*

[140] *Id.* at 276.

[141] *Id.* at 279–81. The Court reasoned that, although the impact on women was sufficiently stark to suggest an intent to discriminate against women, the plaintiff's impact-alone argument failed because the law was explainable on the gender-neutral ground of providing benefits to veterans. *See infra* text accompanying notes 303–07.

[142] *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 546–47 (1999) (holding that, in a dispute over redistricting, "strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision.").

[143] *See* Shaw v. Hunt, 517 U.S. 899, 905 (1996) (citing Miller v. Johnson, 515 U.S. 900, 911, 915–16 (1995)) (holding that the plaintiff bares the burden to demonstrate that race was the predominant factor motivating the legislature's decision to include a significant number of voters within or without a particular voting district); Easley v. Cromartie, 532 U.S. 234, 257 (2001) (citing *Miller*, 515 U.S. at 913).

[144] *See* Shaw, 517 U.S. at 906–07 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)); Easley v. Cromartie, 532 U.S. 234, 241 (2001) (citing Miller, 515 U.S. at 916). Professor Richard Primus suggested that "predominant motive" might mean "a motive so powerful that it sweeps all other values before it" or "the motive for which the law exists at all." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 549 (2003). According to him, those two meanings can co-exist. *Id.* at 549 & n.225.

[145] *See* Shaw, 517 U.S. at 907.

evidence as historical background.[146] The burden of proving a predominant factor is demanding and more difficult than showing a motivating factor.[147] To prove a purpose under the predominant-factor test, a plaintiff must show that the act at issue is unexplainable on any ground besides the allegedly predominant factor.[148] Accordingly, the predominant-factor test seems like a hybrid test because it uses the *Arlington Heights* framework that is used to meet the motivating-factor test,[149] and it also has the unexplainable-on-other-grounds element of the impact-alone test used in stark-disparity cases such as *Yick Wo*.

Many aspects of the predominant-factor test are unclear.[150] For example, the Court has applied the test only in cases challenging re-districting,[151] so whether the test applies in other contexts is unclear. Also unclear is whether an actor's admission that his act was race-based necessarily proves race was the act's predominant factor.[152] Further, the Court has not explained why such an admission proves or suggests that race was a predominant factor behind the act rather than rendering the act expressly race-based.[153] The best explanation for this distinction is that if the act is motivated by any secondary motivations independent of race, it is not considered an expressly race-based act.[154] Finally, commentators

---

[146] *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999); Miller, 515 U.S. at 917–18 (1995) (stating that in assessing a jurisdiction's motivation a court must inquiry into both circumstantial and direct evidence of intent); Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 334 (2001) (the motivating-factor and predominant-factor tests "call for inquiries into legislative history").

[147] *See* Easley v. Cromartie, 532 U.S. 234, 241 (2001) (citations omitted) (noting that the burden of proof on the plaintiffs to show that race was the predominant factor is demanding); *infra* note 283; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545 (2003) (the predominant-factor test "is significantly more deferential to the legislature" than the motivating-factor test is).

[148] *See* Easley v. Cromartie, 532 U.S. 234, 241–42 (2001) (citing Hunt v. Cromartie, 526 U.S. 541, 546 (1999)) (stating that race must have been the predominant factor, not simply a motivating factor).

[149] The *Arlington Heights* framework also applies in certain statutory contexts and to claims of vote dilution brought under the equal protection clause. *See* Hunt v. Cromartie, 526 U.S. 541, 546 n.2 (1999) (asserting that laws that racially gerrymander districting schemes are constitutionally suspect and must be strictly scrutinized).

[150] *See, e.g.*, *infra* note 283; *see also* Bush v. Vera, 517 U.S. 952, 1058 n.7 (1996) (Souter, J., dissenting) (rejecting shape as a sufficient condition for finding a violation, or even a necessary one).

[151] *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 237 (2001) (upholding a redistricting plan for which race was not a predominant factor); Shaw v. Hunt, 517 U.S. 899, 906, 915 (1996) (same); Bush v. Vera, 517 U.S. 952, 962, 973, 986 (1996) (plurality opinion) (same); Miller v. Johnson, 515 U.S. 900, 917, 928 (1995) (striking down a plan for which race was a predominant factor).

[152] The Court held that such an admission at least strongly suggests the official act was race-based. *See* Miller v. Johnson, 515 U.S. 900, 918–19 (1995). Whether such an admission necessarily establishes an act was race-based is unclear. *See Bush*, 517 U.S. at 1000 (Thomas, J., concurring in the judgment) ("[I]n *Miller v. Johnson* . . . Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was a predominant, motivating factor in its redistricting.") (citing *Miller*, 515 U.S. at 918–19).

[153] *See supra* note 106 and accompanying text.

[154] The Court suggested such an admission does not necessarily establish a racial purpose in a "mixed motive" case, which is a case in which the action at issue was not "purely race-based," for example. *See Bush*, 517 U.S. at 959–65 (plurality opinion) (quotation marks omitted) (explaining that the record in question did not reflect a history of purely race-based districting revisions, but

have noted the lack of clarity as to when the motivating-factor test applies instead of the predominant-factor test.[155] All of this confusion should be unsurprising, given that the Supreme Court first used the predominant-factor test in *Miller v. Johnson*, in which the district court created this test[156] by misinterpreting the motivating-factor test.[157] This perhaps explains why Justices Antonin Scalia and Clarence Thomas seemed to think the *Miller* Court was using the motivating-factor test instead of creating a test that placed a higher burden on plaintiffs.[158]

---

rather was one that depicted mixed motive, and therefore careful review was necessary to determine whether the districts were subject to strict scrutiny); *see also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 312 (2001). In such a case, a court must consider all motives to determine whether race was the predominant motive. *See Bush*, 517 U.S. at 959–65 (plurality opinion). Regardless of the wisdom of such a rule, *see id.* at 1002 n.2 (Thomas, J., concurring in the judgment) (the state's admission to relying on race should suffice to show a racial purpose), the "mixed motive" terminology is imprecise and thus does not clearly explain why an admission is dispositive in the context of an expressly race-based act and not in the context of an act predominantly motivated by race. For example, a prison's admitted policy of racially segregating inmates is expressly race-based although it has non-racial motives – *e.g.*, it is motivated by a desire to increase prison safety. *See* Johnson v. California, 543 U.S. 499, 502, 509 (2005); *see supra* note 106. However, the prison's policy is necessarily dependent on race—although many measures can increase prison safety, trying to achieve that end by racially segregating inmates is necessarily a race-based measure. By contrast, a re-districting decision might involve many factors that are independent of race, such as maintaining existing political subdivisions and avoiding contests between incumbents. *See Miller*, 515 U.S. at 906. Therefore, an act is a "mixed motive" one if it had motives independent of, say, race, whereas an act is expressly race-based if its means were dependent on race. Of course, either type of act triggers strict scrutiny. *See infra* notes 160, 161.

[155] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545–46 (2003) (pondering why the Court applied the predominant-factor test in *Miller v. Johnson* but the motivating-factor test in *Arlington Heights*). Note that the "predominant factor" language can determine whether an act is subject to strict scrutiny and separately determine whether the act satisfies that standard. For example, a facially race-neutral act is subject to strict scrutiny if it were predominantly motivated by race, whereas a facially race-based act has survived strict scrutiny at least once because race was not a predominant factor behind the policy. The predominant-factor test would not determine whether to apply strict scrutiny to the latter policy—instead, strict scrutiny would apply to that policy because it was expressly race-based. *See id.* at 546 & n.220; *see also supra* notes 104–06 and accompanying text.

[156] *See Miller*, 515 U.S. at 909–10, 916 (discussing that the district court required the plaintiffs to prove race was the predominant factor in order to trigger strict scrutiny and then adopting that predominant-factor test).

[157] The district court held that a re-districting decision is based on race if race was a "substantial or motivating consideration," which means that "race was *the overriding, predominant force.*" Johnson v. Miller, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994), *aff'd and remanded*, *Miller*, 515 U.S. 900 (footnote omitted). The Supreme Court has stated that a motivating factor is also known as a substantial factor. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977)). However, the Court has explained that a motivating factor need not be dominant among other factors. *See Arlington Heights*, 429 U.S. at 265–66.

[158] Justices Scalia and Thomas joined the five-justice majority opinion in *Miller*. *Miller*, 515 U.S. at 902. One year later, they refused to join the plurality opinion that consisted of the other three justices from the *Miller* majority. Bush v. Vera, 517 U.S. 952, 956–86 (1996) (plurality opinion); *id.* at 999–1003 (1996) (Thomas, J., concurring in the judgment). Their disagreement with the plurality opinion stemmed from whether the predominant-factor test is more difficult to meet or otherwise different from the motivating-factor test. *See id.* at 959 (plurality opinion). *See also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 312–13 (2001) (explaining that Justice Thomas refused to join the plurality opinion in *Bush v. Vera* since it applied the predominant-factor test).

2. *Determining Which Level of Scrutiny the Act's Purpose Triggers*

Courts typically use a three-tiered system of judicial scrutiny for analyzing equal-protection claims: strict scrutiny, intermediate scrutiny, and rational-basis scrutiny.[159] This three-tiered system applies to written or unwritten policies that expressly impose different treatment.[160] Additionally, it applies when the predominant-factor test determines an act's purpose.[161] It also applies in cases that rely on impact alone to determine an official act's purpose.[162]

But a different type of review applies when the motivating-factor test determines an official act's purpose.[163] Under this type of review, the equal-protection claimant bears the burden of showing that a particular suspect purpose, such as racial discrimination, was a substantial or motivating factor behind the act.[164] After meeting that burden, the burden then shifts to the act's defender to show by a preponderance of the evidence[165] that the act would have been performed or enacted without the racial factor.[166] In other words, the act's defender must show that the racial factor was not a "but-for" cause behind the act.[167] If the act's defender fails to meet its burden, Supreme Court precedent is

---

[159] *See supra* note 18. Strict scrutiny applies to state action that treats people differently based on the suspect grounds of race, national origin, or alienage, and it is satisfied only if the state action is narrowly tailored to achieve a compelling state interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Intermediate scrutiny applies to state action that treats people differently based on the quasi-suspect grounds of gender or "illegitimacy," and it is satisfied only if the state action is substantially related to achieving an important state interest. *Id.* at 440-41. Rational-basis scrutiny applies to state action that treats people differently on other grounds, and it is satisfied if the state action is rationally related to achieving a legitimate state interest. *Id.* at 441–42. The government bears the burden of proving why intermediate or strict scrutiny is satisfied. Johnson v. California, 543 U.S. 499, 505 (2005); United States v. Virginia, 518 U.S. 515, 533 (1996).. The equal-protection claimant bears the burden of proving why rational-basis scrutiny is not satisfied. Heller v. Doe by Doe, 509 U.S. 312, 320–21 (1993).

[160] *See supra* notes 105, 106.

[161] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995) (applying strict scrutiny to an official act whose predominant factor was race).

[162] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 642–44 (1993) (holding that strict scrutiny applies not only to express racial classifications but also to statutes whose racial purposes are proven by impact alone); *id.* at 645–47 (1993) (holding that the impact-alone case, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), supports application of strict scrutiny when a racial purpose is proven by impact alone).

[163] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[164] *See* Hunter v. Underwood, 471 U.S. 222, 227–28 (1985) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). The plaintiff might need to make this showing by a preponderance of the evidence. *See Hunter*, 471 U.S. at 225, 227 (describing how the Eleventh Circuit required such a showing, and then approving of the way in which the court applied the *Arlington Heights* framework, but never explicitly stating that the showing must be by a preponderance of the evidence).

[165] *Doyle*, 429 U.S. at 287.

[166] *Hunter*, 471 U.S. at 228 (citing *Doyle*, 429 U.S. at 287).

[167] *See* Hunter v. Underwood, 471 U.S. 222, 232 (1985) (stating that where evidence may show a "but-for" motivation in enacting legislation to curtail discrimination against all blacks an additional purpose to discriminate against poor whites would not render the original motivation void).

unclear as to whether the reviewing court must apply strict scrutiny or declare the act unconstitutional without applying strict scrutiny.[168] Although this "but-for" level of review is a form of heightened scrutiny,[169] it would be lower than strict scrutiny if it led to automatic invalidation because strict scrutiny is the most demanding level of equal-protection review.[170] But automatic invalidation is obviously more demanding than strict scrutiny, so a "but-for" racial motivating-factor likely triggers strict scrutiny, not automatic invalidation.[171] Similarly, an official act that was motivated by a quasi-suspect purpose, such as gender discrimination, is likely subject to intermediate scrutiny rather than automatic invalidation.[172]

IV. AVOIDING A DISPARATE IMPACT AS DIFFERENT TREATMENT THAT LIKELY VIOLATES EQUAL PROTECTION

Ricci v. DeStefano suggests that disparate-impact liability can conflict with equal protection.[173] Justice Scalia's concurring opinion made this potential conflict clear.[174] The logic of this conflict can be boiled down to a simple syllogism. First premise: avoiding a disparate

---

[168] *See id.* at 233 (without applying strict scrutiny, striking down an act motivated by race because it would not have been enacted absent the racial factor). Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (same). Some scholars think a court should apply strict scrutiny to an act if the government fails to prove it would have enacted or performed the act absent a racial motivating factor. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 297, 311, 334 (2001). Although the Court in *Hunter* did not apply strict scrutiny, perhaps it did not mean to suggest that an act is automatically unconstitutional if race were a "but-for" motivating factor. Instead, perhaps the Court did not apply strict scrutiny because the law at issue obviously failed strict scrutiny: the law was enacted to burden African-Americans, and such a purpose obviously is not a compelling state interest. *See Hunter*, 471 U.S. at 233 (the statutory section at issue "was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"). *See also infra* note 275. This reading of *Hunter* makes sense because strict scrutiny is the most stringent level of judicial scrutiny, and automatic invalidation is more stringent than strict scrutiny. *See infra* note 170 and accompanying text. However, perhaps automatic invalidation should not be considered to be any kind of "scrutiny," which means that automatic invalidation could co-exist with the reality that strict scrutiny is the most stringent level of "scrutiny."

[169] *See Arlington Heights,* 429 U.S. at 265–66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.") (footnote omitted).

[170] *See* Miller v. Johnson, 515 U.S. 900, 920 (1995) (noting strict scrutiny is the "most rigorous and exacting standard of constitutional review"); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985); United States v. Virginia, 518 U.S. 515, 533 (1996). *See supra* note 168.

[171] *See infra* text accompanying note 273.

[172] Two years after explaining the burden-shifting "but-for" standard that applies in motivating-factor cases, *see Arlington Heights*, 429 U.S. at 270 n.21, the Court seemed to hold that intermediate scrutiny would apply to an act whose "but-for" motivating factor was gender discrimination. *See* Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) (stating intermediate scrutiny would apply to a law "covertly" designed to benefit one gender). This suggests that strict scrutiny would apply to an act that had a racial "but-for" motivating factor. *See supra* note 168.

[173] *See infra* note 179.

[174] Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring).

impact can constitute different treatment based on race. Second premise: different treatment based on race triggers heightened scrutiny under the Equal Protection Clause. Conclusion: avoiding a disparate impact can trigger heightened scrutiny under the Equal Protection Clause.[175]

While this logic is valid, the Court never reached the second premise because it resolved the case on statutory, rather than constitutional, grounds.[176] However, the second premise is well-established.[177] The Court simply assumed, without explanation, that the first premise is true in the Title VII disparate-treatment context,[178] which suggests the premise would be true in the equal-protection context by analogy.[179] Although the first premise is true,[180] the Court's assumption of its correctness is problematic for at least two reasons. First, the Supreme Court in the future may feel that it is not bound by *Ricci* to accept the first premise, at least in the equal-protection context. A lawyer who argues that disparate-impact avoidance violates equal protection could certainly cite to *Ricci* to establish the first premise by analogy,[181]

---

[175] *Cf.* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1506 (2004) (presenting a somewhat similar syllogism that explains why Caucasians may sue under Title VII when subjected to a racially-disparate impact).

[176] Ricci v. DeStefano, 557 U.S. 557, 563 (2009) ("In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.").

[177] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505–06 (2005) (affirming the difficulty in determining what classifications are motivated by impermissible racial inferiority rather than racial politics yet still requiring the application of strict scrutiny to "*all* racial classifications" (emphasis added)).

[178] Ricci v. DeStefano, 557 U.S. 557, 579 (2009) ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."); *see also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350 (2010) ("[N]o prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment. That is why the Ricci Court had to state the premise in its own voice and without citation.").

[179] Title VII's ban on disparate treatment is not the same as the equal protection clause in every respect. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354-55 (2010); Ricci v. DeStefano, 557 U.S. 557, 582 (2009) ("This suit does not call on us to consider whether the [disparate-treatment] statutory constraints under Title VII must be parallel in all respects to those under the Constitution."). However, much of the *Ricci* Court's reasoning would transfer to the equal-protection context. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 61–70 (2009). *See also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354 (2010) ("Despite the Court's professed intention to avoid equal protection issues, the Ricci premise is properly understood as a constitutional proposition as well as a statutory one. The reason is that constitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII's prohibition on disparate treatment."); *Id.* at 1344 ("Title VII's prohibition of disparate treatment and the Fourteenth Amendment's guarantee of equal protection are substantively interchangeable. A conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection."). *See also* Michael K. Grimaldi, *Disparate Impact After* Ricci *and* Lewis, 14 SCHOLAR 165, 185 (2011) ("Because both equal protection and disparate treatment ban intentional discrimination, the tensions between disparate treatment and disparate impact create a parallel tension between equal protection and disparate impact."); Okruhlik v. Univ. of Arkansas *ex rel.* May, 255 F.3d 615, 626 (8th Cir. 2001) ("[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution") (citing Briggs v. Anderson, 796 F.2d 1009, 1021 (8th Cir.1986)).

[180] *See infra* Part IV.A–B.

[181] *See supra* note 179 and accompanying text.

but the future Supreme Court might reject the analogy or the *Ricci* Court's assumption that the first premise is true.[182] Second, the legitimacy of the *Ricci* Court's acceptance of the first premise is undermined if not adequately supported. The first premise deserves an explanation. This explanation involves the two-step process outlined earlier: determining whether an official act treats one person differently than another, and, if so, then determining whether the act has a suspect purpose.

A. Avoiding a Disparate Impact as Different Treatment

The *Ricci* Court took for granted that avoiding a disparate impact amounts to different treatment.[183] Justice Ginsburg's dissenting opinion at least attempted to challenge that point.[184] Her opinion agreed with the district court's determination that the city's actions "were race neutral in this sense: '[A]ll the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion.'"[185] Academics, including Professor Richard Primus, have expressed a similar sentiment.[186]

However, like treatment in some respects does not mean like treatment in every respect.[187] A different framing of the *Ricci* issue could show different treatment.[188] An employer's decision to discard the

---

[182] *See* Ricci v. DeStefano, 557 U.S. 557, 609 (2009) (Ginsburg, J., dissenting) ("The Court's order and opinion, I anticipate, will not have staying power."); Allen R. Kamp, Ricci v. DeStefano *and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 39 (2011) (the fact that *Ricci* was decided 5-4 suggests it might be limited after the Court's make-up changes).

[183] *See supra* note 178.

[184] *See* Ricci v. DeStefano, 557 U.S. 557, 624–25 (2009) (Ginsburg, J., dissenting) (finding not "even a hint" of conflict in the Court's precedent or Congress' enactments between disparate-impact provisions and an employer's legal disparate-treatment obligations and concluding that Title VII's ban on disparate-treatment and disparate-impact "must be read as complementary" per Court precedent to find harmonious meaning in interpreting separate provisions of a single Act).

[185] Ricci v. DeStefano, 557 U.S. 557, 619–20 (2009) (Ginsburg, J., dissenting) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 158 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009)). *See also id.* at 608 (Ginsburg, J., dissenting) (noting that no employees were promoted "in preference to" the employees that scored highest on the promotional test).

[186] *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1360 (2010) ("Throwing out test results can be understood as facially neutral when the test results are thrown out for everyone; the discrimination, if any, lies in the motivation for that action."); *id.* at 1351 ("If a written test has a racially-disparate impact and the employer throws out the results--as happened in Ricci--the test results are thrown out for all applicants, regardless of race. . . . Obviously, the decision to throw out the test is race-conscious. But throwing out the test results does not involve 'disparate treatment' in the ordinary-language sense of sorting employees into groups and conferring a benefit on members of one group that was withheld from members of the other group.").

[187] *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 575 n.129 (1982) ("'to treat two people equally in one respect will always be to treat them unequally in others'") (quoting *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1065, 1164 (1969) (footnote omitted)).

[188] *See supra* Part III.A.

results of a promotional test is going to affect some test-takers differently than others, perhaps absent unusual circumstances.[189] Consider an employer that has one position available and plans to fill it by promoting one of its employees. The employer will interview for the position the five employees who score highest on a promotional test. Twenty employees take the test, and five score higher than the other fifteen. If the employer discards the test results, doing so would treat the five highest scorers differently than the other fifteen test takers. The difference is due to the fact that, under the test results, the five highest scorers had a greater than zero percent chance of receiving the promotion, whereas the other fifteen were left with a zero percent chance. Thus, discarding the test results increased the fifteen lowest scorers' chances of receiving the promotion from zero percent to greater than zero percent.[190] The same is not true of the five highest scorers, who already had a greater than zero percent chance based on the test results, so these five employees were treated differently than the other fifteen.[191] Moreover, the five highest scorers' chances of receiving the promotion decreased when the results were discarded.[192]

The most on-point authority for this argument is *New York City Transit Authority v. Beazer*.[193] In some respects, the Transit Authority's hiring policy that excluded narcotics users from consideration was "equal" because it applied to everyone.[194] But in reality, the policy entailed different treatment, thus implicating the Equal Protection Clause, because it imposed a "special impact" on only some job applicants—namely, narcotics users.[195] The special impact gave narcotics users a zero percent chance of being hired, while it gave everyone else a chance greater than zero percent.[196]

---

[189] For example, if all of the test takers received the exact same score, the employer would probably discard the results because they failed to serve their purpose of narrowing the pool of applicants who merit further consideration for a promotion. Under such a scenario, discarding the test results would not be different treatment because each test taker had the same statistical chance of receiving the promotion as every other test taker, both after the results were known and after the results were discarded.

[190] *See, e.g.*, Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257, 1272 (2010) (explaining that when the city in *Ricci* discarded the test results, the employees who failed the test had their "chance for promotion improved to something better than no chance at all").

[191] *Id.* (explaining that the *Ricci* employees who passed the test "would be adversely affected by the decision not to use the test results was clear").

[192] Under the test results, the five highest scorers had on average a 20% chance of receiving the promotion. At best, their chances will remain the same if only they decide to take the next test that the employer uses. But if anyone else competes against them on the next test, then their chances of being promoted will decrease.

[193] N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 570–71 (1979). *See supra* text accompanying notes 65–72 for a discussion of this case.

[194] *Id.* at 587–88.

[195] *See id.* at 587–89 (discussing the District Court's interpretation of Transit Authority Rule 11(b) as applying to narcotics users and the constitutional implications of that interpretation).

[196] *See id.* at 570–72 (describing the Transit Authority's "general policy" of refusing to employ narcotics users, including methadone users).

Justice Ginsburg's *Ricci* dissent likely would respond by arguing that discarding promotional test results does not treat employees who passed the test differently than those who failed it, because all of the employees "had no vested right to promotion."[197] The district court in *Ricci* took the same view.[198] But a plaintiff can state an equal protection claim, including in the employment context, without having been deprived of a vested right[199]. In *Beazer*, the narcotics-using job applicants clearly had no vested right in being hired or considered for employment,[200] but the Court considered the equal-protection claim anyway.[201] More generally, people have standing to bring an equal protection challenge to a policy that hinders their chance of receiving a

---

[197] Ricci v. DeStefano, 557 U.S. 557, 608 (2009) (Ginsburg, J., dissenting).

[198] Ricci v. DeStefano, 554 F. Supp. 2d 142, 161 (D. Conn. 2006), *rev'd*, 557 U.S. 557 (2009) (rejecting the plaintiffs' argument that they were not similarly situated to the employees who failed the test, because the test results did not give the plaintiffs a vested right to promotion). Note that the *Ricci* plaintiffs should have argued they were similarly situated with the employees who failed the test. An equal protection violation can occur only if similarly-situated individuals are treated differently than each other. *See supra* notes 44–49 and accompanying text. If two individuals are not similarly situated, then treating them differently cannot violate the equal protection clause. *See id.* Thus, the *Ricci* plaintiffs should have argued they were similarly situated with their co-workers who failed the test in the sense that all of them were given the same opportunity to pass the test. *Cf.* Graham v. Long Island R.R., 230 F.3d 34, 40 (2d Cir. 2000) (describing "similarly situated" in an equal protection case in which an employee challenged discipline by her employer as meaning that a plaintiff and "her co-employees were subject to the same performance evaluation and discipline standards" and "engaged in comparable conduct") (citations omitted).

Of course, employees who passed a test are not similarly situated with employees who failed a test in the sense that one group passed the test and the other did not. But employee-plaintiffs should not argue this point. Rather, an employer-defendant should argue this point if its employees who failed the test sue it over its decision to promote the employees who passed the test. Thus, the employer would argue that it complied with equal protection because the two groups it treated differently were not similarly situated with each other. *See* Ruiz v. Cnty. of Rockland, 609 F.3d 486, 494–495 (2d Cir. 2010) (holding employer-defendant did not violate equal protection by disciplining the plaintiff-employee without disciplining other employees who engaged in misconduct, because the plaintiff was not similarly situated with those other employees).

There is nothing inconsistent or incoherent about *Ricci*-type plaintiffs arguing they are similarly situated with employees who failed the test, while an employer makes a seemingly contrary argument when sued by employees who failed the test. Both arguments can be correct because two groups can be similarly situated in one sense and differently situated in another sense. *See supra* notes 84–94 and accompanying text. The "similarly situated" analysis considers whether differently-treated groups are similar in ways relevant to their different treatment. *See id.* If two groups are alike in one respect, they should be treated alike in that respect; if they differ in another respect, they may be treated differently in that respect. *See supra* note 86. Thus, if a lawsuit challenges an employer's decision to discard test results, then the "similarly situated" analysis should consider whether the employees were alike in the sense that they had a similar opportunity to pass the test. This sense is relevant to the decision to discard the test results (*e.g.*, the different treatment at issue). So, if a test were designed to fail persons of a certain race, then the test-takers were not similarly situated in this sense, so discarding the test results would not violate equal protection. *See supra* notes 44– 49 and accompanying text; *cf. infra* note 253. If a lawsuit challenges an employer's decision to promote employees who passed a test, then the "similarly situated" analysis should focus on whether all test-takers were alike in the sense that they were similarly qualified for promotion. This sense is relevant to the decision to hire only some employees (e.g., the different treatment at issue).

[199] *See supra* note 72.

[200] *See supra* note 72.

[201] *Beazer*, 440 U.S. at 587–94.

governmental benefit without having to prove that they would have received the benefit absent the policy.[202]

This analysis merely argues that plaintiffs may state an equal-protection claim against a public employer when it discards or adjusts the results of a promotional test the plaintiffs passed.[203] Plaintiffs would not need to prove, as a threshold matter, that they are similarly situated with the other job applicants or employees who took the test.[204] Instead, being similarly situated, or not, is a conclusion the court would draw based on an application of a particular level of judicial scrutiny.[205] Nothing in this section suggests whether any particular equal-protection claim would likely prevail. That issue will often depend on which level of scrutiny applies, which hinges on whether the employment decision had a suspect purpose.[206]

B. Level of Scrutiny Required for Disparate-Impact Avoidance that Implicates Equal Protection

Stating an equal-protection claim is not synonymous with prevailing under such a claim.[207] The claim's likelihood of success depends on which level of scrutiny applies.[208] Imagine a situation in which an employer used a promotional test like the one in *Ricci*, except the test results were not skewed along any suspect line, such as race. The employees who failed the test could state an equal protection claim against their employer for hiring someone over them.[209] In that lawsuit,

---

[202] Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993).

[203] *See supra* note 54.

[204] *See supra* notes 198 & *supra* notes 84–94 and accompanying text. However, the plaintiffs will ultimately need to prove they were similarly situated with the other test-takers if rational-basis scrutiny applies, because that level of scrutiny places the burden of proof on the plaintiffs. *See supra* notes 18, 159.

[205] *See supra* notes 84–94 and accompanying text.

[206] *See supra* Part III.B.2 and *infra* Part IV.B.

[207] *See supra* Part III.B. Indeed, the plaintiffs in *Beazer* and *Martin* lost their equal protection claims under rational-basis scrutiny. *See Martin*, 440 U.S. at 201 (holding that contract nonrenewal was "quite rationally related" to the employer's objective); *Beazer*, 440 U.S. at 593–94 (stating there is no constitutional violation even where the sub-classification at issue is less rationally related to the policy goal than the overarching classification); s*ee also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating that rational-basis scrutiny applies to most state action when challenged under the equal protection clause); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001) (holding different treatment "often does not amount to a constitutional violation where rational-basis scrutiny applies").

[208] *See supra* Part III.B.2.

[209] *See generally Beazer*, 440 U.S. 568 (1979) (challenging a policy of not hiring methadone users); Washington v. Davis, 426 U.S. 229 (1976) (challenging use of a verbal skills test as racial discrimination). *See also* Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199–200 (1979) (teacher stated an equal-protection claim by arguing that she was fired for failing to satisfy a continuing-education requirement). *See also supra* notes 54 & 68.

the employer's decision to promote the employees who passed the test likely would be upheld under rational basis scrutiny.[210] Likewise, the employees who passed the test could state an equal protection claim against their employer if it discarded or adjusted the test results,[211] and a court would likely uphold the employer's decision under rational-basis scrutiny. This low level of scrutiny would likely apply in either lawsuit because the fact that the test results were not skewed along any suspect line suggests that the employer's decision to use or discard the test results was not based on a suspect rationale.[212]

The issue of which level of scrutiny should apply to either type of lawsuit becomes more complicated when the test results are racially skewed, like in *Ricci*. The following analysis will focus only on the type of lawsuit that challenges an employer's decision to discard employment-related test results, not the decision to give a particular test or use its results. Determining which level of scrutiny applies depends on the answer to two questions. First, does an employer make a race-based decision when it discards test results because they are racially-skewed? If so, how may a plaintiff prove in a particular lawsuit that the employer's decision was based on race?[213] Each of these two questions will be answered in turn.

1. *Discarding Racially-Skewed Test Results as a Race-Based Act*

Recall the governing standard for determining whether an official act was based on race: an act is based on race if made "at least in part 'because of,' not merely 'in spite of,'" its impact along racial lines.[214] The *Ricci* Court stated that the City of New Haven "made its employment decision because of race. The City discarded the test results solely because the higher-scoring candidates were white."[215] There is a difference between "because of" and "solely because of," and claiming the city acted solely because of race might have been an

---

[210] *See Washington*, 426 U.S. at 245 ("Had respondents, along with all others who had failed [the police department's hiring test], whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained.").

[211] *See supra* Part IV.A.

[212] Of course, a plaintiff could prove intentional racial discrimination absent racially-skewed test results. Such results would make the proof easier, though. *See supra* Part III.B.1.

[213] The plaintiff carries the burden of proving that a challenged act was race-based. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 915 (1995) ("Although race-based decisionmaking [*sic*] is inherently suspect, . . . until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed[.]") (citations omitted).

[214] *See supra* note 103 and accompanying text.

[215] Ricci v. DeStefano, 557 U.S. 557, 579–80 (2009).

overstatement.[216] Nevertheless, for equal-protection purposes, heightened scrutiny applies if the decision was made at least in part because of, even if not solely because of, a suspect purpose such as race.

The *Ricci* Court seemed to find no difference between making a decision based on race and based on avoiding racially-skewed results.[217] Although those two things technically are not the same, a decision to avoid racially-skewed results is necessarily a decision at least partly based on race.[218] Some commentators have suggested that a decision is not race-based simply because it is done to avoid racially-skewed results,[219] avoid disparate-impact liability,[220] or give in to political pressure.[221] But those suggestions prove too much because the decision to avoid the skewed test results is necessarily tied to race. Likewise, potential disparate-impact liability in *Ricci* was due to race, and the political pressure was necessarily about race. Eliminating race from the equation would have eliminated the employer's reason to avoid the skewed results and disparate-impact liability, and it would have eliminated the political pressure. That means the employer's discarding of the results was at least partly because of race.

Similarly, other arguments that the *Ricci* employer's decision was

---

[216] *See* Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1271–79 (2010) (arguing the decision was not made solely based on race).

[217] *Compare* Ricci v. DeStefano, 557 U.S. 557, 580 (2009) ("The City rejected the test results solely because the higher scoring candidates were white."), *with id.* at 593 ("the City was not entitled to disregard the tests based solely on the racial disparity in the results").

[218] *Cf.* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350 (2010) ("Disparate treatment doctrine prohibits race-conscious decisionmaking [*sic*], and disparate impact remedies are always race-conscious. There is accordingly a tension between the two frameworks."); *id.* at 1353 ("If Title VII's prohibition on disparate treatment is understood as a general requirement of colorblindness in employment, then it is easy to see any race-conscious decisionmaking [*sic*] as disparate treatment. Disparate impact doctrine does require race-conscious decisionmaking [*sic*], so it follows that there is a conflict between the two frameworks. It's as simple as that. No court ever took this view before, but many people now and in the future will regard the proposition as obvious.").

[219] Michael J. Zimmer, Ricci*'s "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1276 (2010) ("[T]here is an apparent contradiction between the finding that the City's action was motivated by a desire to avoid disparate impact liability against minority test takers and the conclusion that the motivation for the City's decision was 'solely because the higher scoring candidates were white' if the prior distinction between actions taken 'because of' versus 'in spite of' still pertains.").

[220] *See id.* at 1275 n.37 (quoting Charles A. Sullivan, Ricci v. DeStefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U.L. REV. COLLOQUY 201, 207 (2009) ("It seems strange to view the city of New Haven as canceling the test *because* it wanted to disadvantage the white firefighters, although New Haven certainly knew that that would be the result. A better reading of the facts (or at least a plausible one) is that New Haven acted to avoid disparate impact liability *despite* the 'adverse effects upon an identifiable group' of whites.")).

[221] *See* Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1277–78 (2010) (arguing that the *Ricci* employer's best defense against Title VII disparate-treatment liability may have been to admit that its discarding the test results was done due to political pressure); Ricci v. DeStefano, 554 F. Supp. 2d 142, 170 n.12 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009) ("Assuming *arguendo* that political favoritism or motivations may be shown to have been intertwined with the race concern, that does not suffice to establish a Title VII violation.) (citation omitted).

not race-based are unconvincing. One such argument is that the decision was not based on animus.[222] The district court in *Ricci* accepted this argument by relying on the *Feeney* Court's reference to "adverse" effects.[223] Specifically, the *Feeney* Court's definition of "discriminatory purpose" states that an act purposely treats two groups differently if done "at least in part 'because of,' not merely 'in spite of,' its *adverse effects* upon an identifiable group."[224] However, purposeful discrimination is subject to the same level of scrutiny regardless of whether it is adverse or beneficial to any particular group.[225] The Court in *Feeney* made that point somewhat clear when it stated that "[a] racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification."[226] This last quote did not mean that motivation is irrelevant to determining which level of scrutiny applies.[227] Rather, "racial classification" meant any official act that differentiates on the basis of race either expressly or because of the motivations behind it,[228] and "regardless of purported motivation" is subject to the same level of scrutiny regardless of whether it was motivated by a desire to benefit or burden any particular racial group.[229]

Another argument, which the district court accepted in *Ricci*, is that the decision applied to everyone, so it was not based on race.[230] This argument is likely the weakest one because the alleged identical treatment of an act does not determine the act's purpose. The district

---

[222] *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 161–62 (D. Conn. 2006) (rejecting the equal-protection claim because the plaintiffs failed to show the defendant acted out of animus), *rev'd and remanded*, 557 U.S. 557 (2009). *See also* Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257, 1268–70 (2010) (arguing that disparate-treatment liability requires animus and that animus was absent in *Ricci*, and that the employer's decision was taken in spite of, not because of race). He seemed to argue that the decision's lack of animus made it non-race-based. *Id.* Thus, he might share the district court's view.

[223] *See* Ricci v. DeStefano, 554 F. Supp. 2d at 161–62.

[224] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (emphasis added) (footnote omitted); *see also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 309 (2001) (defining discriminatory purpose as a "state of mind" held by the government towards the government action, and mirroring the model penal code's definition of purpose).

[225] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27.

[226] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (citations omitted) (emphasis added).

[227] *Supra* Part III.B.1 & *supra* note 57.

[228] In other words, the act treats groups differently, thus satisfying "step one" of an equal-protection claim. *See supra* Part III.A. Further, the act is race-based under "step two." *See supra* Part III.B.

[229] *See* Shaw v. Reno, 509 U.S. 630, 643–44 (1993) (quoting this passage from *Feeney* to support the principle that strict scrutiny applies to an official act that differentiates based on race regardless of whether the act is race-based expressly or due to the motives behind the act, and regardless of whether the act is intended to benefit or burden any particular group).

[230] Ricci v. DeStefano, 554 F. Supp. 2d 142, 161–62 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009) ("[A]ll applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted. This does not amount to a facial classification based on race.") (footnote omitted).

court conflated[231] the separate issues of whether the employer's decision amounted to different treatment and whether it had an impermissible purpose.[232]

Professor Richard A. Primus developed perhaps the most thoughtful argument as to why an employer's decision to alter racially-skewed test results is not race-based.[233] He supported this argument with a hypothetical scenario that involves two prospective employees, Ms. White and Ms. Black.[234] They applied to work for an employer that used two written tests, Test A and Test B, as the basis for its hiring decisions.[235] Based on each job applicant's combined score on both tests, Ms. White but not Ms. Black qualified to be hired.[236] But to avoid the racially-skewed test results of all applicants, the employer decided to hire applicants based only on Test B.[237] That decision allowed Ms. Black to get hired instead of Ms. White, because the former outscored the latter on Test B.[238]

Professor Primus argued that the hypothetical employer did not treat Ms. White differently than Ms. Black on the basis of race.[239] Essentially, he reasoned that the decision is not like affirmative action.[240] First, job applicants of all races were given the same test, their tests were scored under the same criteria, and the decision to use only Test B's results applied to all applicants.[241] Second, once the employer decided to rely only on Test B's results, it would not have hired Ms. White, regardless of her race. That is, even if Ms. White had been a member of a

---

[231] *Id.* ("Plaintiffs' Equal Protection claim . . . lacks merit, with respect to both the racial classification and disparate treatment arguments" because everyone took the same test and everyone's results were discarded). By "disparate treatment," the court meant different treatment for purposes of the equal protection clause, rather than Title VII disparate treatment. *See id.* at 160–61 (analyzing the equal-protection issue after dismissing the Title VII disparate-treatment claim).

[232] *See supra* Part III (discussing those two separate issues).

[233] The following argument by Professor Primus argues that an employer can alter results of hiring tests in order to avoid a racially-disparate impact without making a decision based on race. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 563–65 (2003). However, his hypothetical involving Ms. White and Ms. Black seems to relate to whether the employer's decision amounted to different treatment, rather than relating to whether the decision was based on race. *See infra* note 243 and accompanying text (discussing a disparate impact law's effect on applicants of differing races). He seems to agree with this assessment in subsequent work. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350–52 (2010) (arguing that an employer's decision to discard results of hiring tests to avoid a racially-disparate impact "[o]bviously . . . is race-conscious," but it is not disparate treatment).

[234] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564–66 (2003)

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564–65 (2003).

[240] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564, 565 & n.270 (2003).

[241] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 565 (2003).

race that benefitted from the employer's decision to discard Test A's results, she would not have been hired because her Test B score was too low.[242]

Ultimately, however, that reasoning is unconvincing. First, the hypothetical employer still made a race-based decision, the superficial "equality" notwithstanding.[243] Certainly, the laws at issue in *Guinn v. United States*, *Lane v. Wilson*, *Yick Wo v. Hopkins*, and *Gomillion v. Lightfoot* applied "equally" to everyone in the sense that they did not have criteria for one race that were inapplicable to another race.[244] But the Court was correct to hold there were equal protection violations in all four of those cases because, in a different sense, the laws did not apply the same to everyone. Professor Primus is correct that the hypothetical employer treated job applicants the same in several respects. But the employer made a race-based decision because, in another respect, the employer decided to discard Test A's results at least partly due to race.[245] Professor Primus avoids that conclusion by instead focusing on the fact that the hiring decision was not race-based after the employer made the race-based decision to discard Test A's results. However, although the hiring decision is not race-based, "[i]ntentional discrimination is still occurring, just one step up the chain."[246]

Accordingly, the employer's decision to discard Test A's results was race-based, although Ms. White would not have been hired based on Test B alone even if she were of a different race. One step up the chain, the employer decided to ignore Test A at least partly because of the race of the job applicants whose combined scores entitled them to be hired.[247] Thus, that was a race-based decision, even if the arguably separate hiring decision was not race-based.[248] The analysis should not focus on Ms.

---

[242] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 565 n.270 (2003) ("Ms. White would have been hired had there been no disparate impact law, but given the existence of such a law, her race is irrelevant to the decision not to hire her. She would not have been hired even if she had been black.").

[243] *See* Anderson v. Martin, 375 U.S. 399, 404 (1964) (holding unconstitutional a law that required ballots to identify political candidates' races because "we view the alleged equality as superficial").

[244] *See supra* notes 114–17 (discussing these cases).

[245] Professor Primus seems to acknowledge this fact. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564 (2003) (under his hypothetical, "the operation of disparate impact doctrine reallocates one position from a white applicant to a black applicant"); *id.* at 565 n.270 ("Ms. White would have been hired had there been no disparate impact law . . . .").

[246] Ricci v. DeStefano, 557 U.S. 557, 594–95 (2009) (Scalia, J., concurring).

[247] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564 (2003) ("It turns out that Test A has a disparately adverse impact on black applicants as compared with white applicants, and the employer cannot demonstrate that Test A is required by business necessity, so the employer eliminates Test A.").

[248] Professor Primus wrote that his hypothetical had an "absence of differential group treatment at the moment of the employment decision." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 565 (2003). But, under the facts of his hypothetical, the employer would hire any employee who received a certain combined score on Tests A and B. *Id.* at 564. When the employer discarded Test A's results, it decided to hire anyone with a particular score on Test B. *Id.* Hence, both before and after Test A was discarded, the test scores alone would

White's race alone.[249] For example, in *Personnel Administrator of Massachusetts v. Feeney*, the Court held the law at issue was not gender-based because there was no evidence of intent to discriminate against women[250]. The Court paid no attention to the fact that the law would have burdened Ms. Feeney even if she were male because she was a non-veteran,[251] although Professor Primus's logic would assign great weight to that fact.[252]

2. *How Plaintiffs May Show an Employer's Decision Was Based on an Impermissible Purpose*

Recall the four methods to show that an official act has an impermissible purpose.[253] Also recall that the method used will partly determine which level of scrutiny applies.[254]

a. Showing an Employment Decision's Express Purpose by Showing an Employer's Writing or Admission

The way to most clearly show an act's purpose is by showing its

---

determine whether any particular applicant would be hired. Therefore, the decision to ignore Test A and hire everyone with a certain score on Test B essentially was the "moment of the employment decision." *Id.* Nothing the employer subsequently did would affect which applicants got hired. *Id.* at 565. In other words, the decision to discard Test A was the hiring decision—and it was race-based. But even if the decision to discard Test A is somehow distinct from the hiring decision, the former decision is still race-based, even if the latter is not.

[249] *Supra* note 242 and accompanying text.

[250] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279–281(1979).

[251] *See supra* text accompanying note 112 (discussing *Feeney*).

[252] If a public employer learned its tests were designed to create racially-skewed results, the employer's race-based decision to discard the test results would not violate equal protection. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (upholding statues tailored to achieve a governmental purpose). Justice Scalia has correctly explained why remedying one's own racial discrimination complies with the equal protection clause: "[A] State may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment). *See also supra* note 198 (declaring that equal protection violations can only occur amongst similarly-situated individuals).

[253] *See supra* Part III.B.1.

[254] If a racial purpose is shown to be a motivating factor, then the employer's decision would be subject to a burden-shifting test possibly followed by strict scrutiny. If shown any other way, strict scrutiny would apply to the decision. *See supra* Part III.B.2.

express purpose.[255] This can be done most easily by pointing to a writing. In the employment context, an expressly racial purpose seems more likely to be part of an affirmative action program than an employer's *post hoc* decision, such as discarding test results, that avoids a racially-disparate impact.[256] Thus, an employer's admission is the most likely way to prove that the employer's decision to discard or alter the results of an employment-related test was expressly race-based.[257] Although some commentators have questioned whether the Supreme Court in *Ricci* required the plaintiffs to prove the employer's decision was race-based,[258] the Court seems to have ruled that the decision was expressly race-based due to the employer's admission.[259] Because the employer's decision implicated the Equal Protection Clause[260] and was expressly race-based, it would be subject to strict scrutiny.[261]

But a plaintiff may have difficulty getting such an admission from an employer because an employer can lie about its reasons for acting.[262] Similarly, an employer may not be consciously aware of its reasons for acting.[263] Hence, using another method of proof may be necessary to successfully prove a suspect purpose.

b. Showing an Employment Decision's Purpose by Showing Its Motivating Factor

Absent an expressly race-based decision, a plaintiff could show an

---

[255] *See supra* Part III.B.1.a.

[256] *See, e.g.*, United States v. Brennan, 650 F.3d 65, 96–104 (2d Cir. 2011) (discussing the difference between an affirmative action program and an *ex post* decision to avoid a disparate impact).

[257] *See* Johnson v. California, 543 U.S. 499, 502–03, 508–09 (2005) (finding an unwritten prison policy to be expressly race-based because the prison admitted to the existence of the policy). *See also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 539 (2003) (suggesting that an express admission may not be the most compelling way to prove that an employer's decision was race based, although this view was taken before *Johnson* was decided).

[258] *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 107 (2010) ("[B]y imputing race-specific harm to a race-neutral decision, the Ricci plaintiffs were given a racial preference: Unlike ordinary Title VII plaintiffs, they were relieved of any requirement to demonstrate pretext or prove an impermissible racial motive.") (citing Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257 (2010)). Professors Harris and West-Faulcon are correct that the Court did not seem to require the *Ricci* plaintiffs to prove the race-based decision was motivated by animus, which is a requirement under Title VII. Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1268–69 (2010). But the *Ricci* employer's decision was still race-based.

[259] *See* Ricci v. DeStefano, 557 U.S. 557, 579 (2009) (the employer's decision was "express, race-based"); *id.* at 566 (discussing the employer's stated race-based concerns with the test results).

[260] *See supra* Part IV.A. (explaining how discarding a test negatively affects those that passed).

[261] *See supra* note 160 and accompanying text.

[262] *See* Batson v. Kentucky, 476 U.S. 79, 105-06 (1986) (Marshall, J., concurring).

[263] *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

employer's decision was race-based because race was a motivating factor behind the decision.[264] Some commentators have questioned whether the motivating-factor test applies in a *Ricci*-type situation. According to Professor Richard Primus, the predominant-factor test, rather than the motivating-factor test, might apply in a lawsuit that challenges an action taken to avoid a disparate impact against racial minorities.[265] He noted that the motivating-factor test applied in *Arlington Heights*, a case in which racial minorities were burdened by the state action at issue.[266] By contrast, in a case in which state action benefits historically disadvantaged groups, the plaintiffs bear the more-difficult burden of proving that race was the state's predominant motive in cases challenging re-districting that seek to help racial minorities.[267]

However, the motivating-factor test applies in the employment context.[268] Professor Primus acknowledged that case law does not confirm or reject his view that the applicable level of proof depends on whether the challenged act intended to help racial minorities.[269] He noted other possible explanations for why the motivating-factor test is inapplicable in cases challenging re-districting.[270] Further, he seemed to acknowledge that the Supreme Court has refused to apply the motivating-factor test only in cases challenging re-districting.[271] Indeed, the Court has explained that "*outside the districting context*, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are *motivated by* a racial purpose or object."[272] Finally, because the fact that a challenged act intends to benefit a

---

[264] *See supra* Part III.B.1.c.

[265] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545–51 (2003).

[266] *Id.* at 546–47.

[267] Id. (distinguishing Miller v. Johnson, 515 U.S. 900 from Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252) ("*Arlington Heights* states a rule for laws intended to burden members of historically disadvantaged groups, and Miller states a rule for laws intended to benefit such groups. . . . In such a case, a racially-allocative motive might provoke strict scrutiny only when that motive eclipses all others and becomes predominant. In a case where the intent to discriminate against African Americans was a motivating factor in the drawing of a district, strict scrutiny might apply under the principle of Arlington Heights.")

[268] *See* Miller v. Johnson, 515 U.S. 900, 913 (1995) (holding that, outside the districting context, statutes are subject to strict scrutiny so long as they are "motivated by" a racial purpose).

[269] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 547 (2003).

[270] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545–46 & n.216 (2003).

[271] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 547 n.218 (2003); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1360 n.101 (2010) (citing only to re-districting cases for the proposition that the predominant-factor test could apply in cases challenging official actions taken to avoid disparate impact).

[272] Miller v. Johnson, 515 U.S. 900, 913 (1995) (emphases added) (citing Shaw v. Reno, 509 U.S. 630, 644 (1993)); *see also* Hunt v. Cromartie, 526 U.S. 541, 547 (1999) ("[I]n this context [of re-districting], strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision").

particular racial group does not alter the applicable level of scrutiny,[273] that fact likewise should not alter the plaintiff's burden of proving a racial purpose behind the act.[274]

Although the motivating-factor test can apply in a challenge to an employer's action taken to avoid a racially-disparate impact, how it would apply is unclear. Significant facts could include that an employer knew the results of a test, the results were racially-skewed, and the employer took action to avoid or mitigate that skew, such as discarding test scores or adjusting them. These facts alone could establish race was a motivating factor.[275] Even if the employer convinced the court that its action had a race-neutral reason, that would not necessarily establish that race was not a motivating factor.[276] If race were a motivating factor, the employer would prevail if it proved by a preponderance of the evidence that it would have taken the action without the racial motive.[277]

c. Showing an Employment Decision's Purpose by Showing Its Predominant Factor

In addition to showing race was the express purpose or a motivating factor of an employer's decision, a plaintiff could try to prove race was the action's predominant factor.[278] Of course, proving that race was the predominant factor behind the employer's action would necessarily also

---

[273] *See supra* notes 222–29 and accompanying text; *see also supra* note 213.

[274] *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 311–12, 320–21 (2001) (the motivating-factor test applies outside of the re-districting context, including in cases challenging racial preferences in university admissions). Professor Primus seemed to hold a contrary view due to his desire to benefit racial minorities. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499, 502 (2003). Of course, state action that sought to benefit racial minorities would more likely be upheld if plaintiffs had to prove a racial predominant factor rather than motivating factor. *See supra* note 147 and accompanying text. However, Professor Primus understated a plaintiff's burden of proving a racial motivating factor. He claimed that "a showing that racial allocation was a motivating factor . . . would trigger strict scrutiny under *Arlington Heights*." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545 (2003) (footnote omitted). Actually, if race were a motivating factor behind an act, the act would trigger strict scrutiny, if at all, only if the racial factor were a "but-for" cause of the act. *See supra* note 168.

[275] *See, e.g.*, Lauren Klein, Ricci v. DeStefano: *"Fanning the Flames" of Reverse Discrimination in Civil Service Selection*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 391, 397–98 (2009) (discussing Biondo v. City of Chicago, 382 F.3d 680, 684 (7th Cir. 2004); Dallas Fire Fighters Assoc. v. City of Dallas, 150 F.3d 438, 441 (5th Cir. 1998); Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1269 (11th Cir. 2003)).

[276] *See* text accompanying *supra* note 129; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

[277] *See* Hunter v. Underwood, 471 U.S. 222, 227–28 and 232 (1985). The plaintiff might need to make this showing by a preponderance of the evidence. *See id.* at 225, 227 (noting the court of appeals required such a showing and later noting the court of appeals correctly used the *Arlington Heights* framework). *See also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[278] *See supra* Part III.B.1.d.

prove that race was a motivating factor.[279] But a plaintiff who proves a racial motivating factor would have good reason to try to prove that race was the predominant factor: the former proof shifts the burden of proving race was not a but-for cause of the action to the defendant, whereas the latter proof triggers the more rigorous strict scrutiny.[280] If a plaintiff fails to prove race was an express purpose behind the action and fails to prove the action's impact alone reveals a racial purpose, then the predominant-factor test would be the final way to trigger strict scrutiny on the ground of racial discrimination.[281]

Unfortunately, the Supreme Court has not clearly explained how or whether the predominant-factor test applies outside of the re-districting context.[282] Commentators have read *Ricci* to apply the predominant-factor test in the Title VII context[283] and have read *Parents Involved in Community Schools v. Seattle School District No. 1* to use the same test in an equal-protection challenge to race-based assignments of students to public schools.[284] However, no opinion in *Parents Involved* mentioned that test, probably due to the fact that the state action at issue was a written policy that was expressly, facially race-based.[285] Somewhat similarly, the majority opinion in *Ricci* mentioned only one time that race was the predominant factor behind the employer's action at issue.[286] However, the *Ricci* Court also stated that the employer's decision was expressly race-based.[287] Perhaps the *Ricci* Court meant that the employer's decision was race-based both expressly and under the predominant-factor test. For two reasons, relying on the predominant-factor test might have been useful in *Ricci* while being unnecessary in *Parents Involved*. First, assigning students to schools based on race is a more clearly race-based act than is discarding employment-test results to avoid a racially-disparate impact.[288] Second, a written policy might serve

---

[279] *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 312 n.101 (2001) (citing Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion); *id.* at 1000 (Thomas, J., concurring in the judgment)).

[280] *See supra* Part III.B.2.

[281] *See supra* Part III.B.2.

[282] *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 336 (2001) ("The Supreme Court has not provided much guidance on how one might go about establishing that a particular legislative motivation was 'predominant,' as opposed to merely a 'but for' cause [that is, a motivating factor], beyond pointing out the obvious fact that it is more difficult to make such a showing[.]"); *see also* text accompanying *supra* note 151 (noting that the Supreme Court applied this test only in the re-districting context).

[283] *See, e.g.*, Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 70-72 (2009); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1360–61 (2010).

[284] Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 70–72 (2009).

[285] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007).

[286] *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009).

[287] *See* Ricci v. DeStefano, 557 U.S. 557, 579 (2009) (stating the employer's decision was "express, race-based").

[288] *See supra* Part IV.B.1.

as more definitive proof than an admission does that a particular act was race-based.[289] Accordingly, those commentators seem correct that the predominant-factor test can apply outside of the re-districting context.[290]

Because the predominant-factor and motivating-factor tests consider the same evidence,[291] a challenge to an employer's decision to alter or discard test results should consider the nature of the results and whether the employer was aware of them before making the decision. For example, if the employer knew that the test results were racially-skewed before discarding them or adjusting them in a way that mitigated or eliminated the skew, that knowledge would at least strongly suggest that race was the decision's predominant factor.[292] The existence of other factors could, but would not necessarily, prevent a finding that race was the predominant factor.[293]

d. Showing an Employment Decision's Purpose by Showing Its Impact

The final way a plaintiff could show an employer's action was race-based is by relying solely on the action's impact.[294] In *Ricci*, for example, the employer's decision to discard the test results both burdened and benefited employees from several racial and ethnic groups.[295] In particular, the employer's decision to discard the test results for open lieutenant positions burdened ten candidates who were eligible for immediate promotion, all of whom were Caucasian.[296] The decision also burdened at least three African-American candidates who passed the test and thus could have been promoted in the event of a future vacant lieutenant position.[297] The decision benefited eighteen Caucasian, thirteen African-American, and twelve Hispanic candidates that failed the test.[298] Similarly, the decision to discard the captain test results burdened seven Caucasian and two Hispanic candidates; it benefited as many as eighteen Caucasian, eight African-American, and six Hispanic

---

[289] *Cf. supra* notes 152–54 and accompanying text.

[290] But this does not mean that the predominant-factor test applies to the exclusion of the motivating-factor test in any context besides re-districting. *See supra* Part IV.B.2.b.

[291] *See supra* note 146 and accompanying text (explaining that both require inquiries into legislative history).

[292] *See supra* note 275.

[293] *See supra* note 145 and accompanying text.

[294] *See supra* Part III.B.1.b.

[295] *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1351 (2010).

[296] Ricci v. DeStefano, 557 U.S. 557, 566 (2009).

[297] Ricci v. DeStefano, 557 U.S. 557, 566 (2009). Thirty-four total candidates passed the lieutenant test. *Id.* Twenty-five of them were Caucasian, six were African American, and three were Hispanic. *Id.*

[298] *See id.* (Discarding the test results also benefited the firefighters that passed the test but stood little chance of being promoted).

candidates.[299]

Although the *Ricci* employer's decision to discard the results for both tests disproportionately burdened Caucasian firefighters, the disparity is not clearly sufficient to prove the decision was race-based. In the rare cases where the Supreme Court ruled a disparity was stark enough to prove intentional racial discrimination, the benefits went almost exclusively to one race and the burdens went almost exclusively to another race.[300] Instead, *Ricci*'s disparity may be more comparable to that in *Feeney*, which lacked sufficient proof of intentional discrimination against women: the law at issue burdened almost all women and a majority of men, although it benefited men almost exclusively.[301]

However, being analogous to *Feeney* does not mean the disparity in *Ricci* would have been insufficiently stark to prove race-based intent. The *Feeney* Court stated: "If the impact of this statute could not be plausibly explained on a neutral ground, *impact itself would signal* that the real classification made by the law was in fact not neutral [e.g., was gender-based]."[302] In other words, the *Feeney* plaintiff's impact-alone argument[303] failed to prove the law purposely burdened women because the law could be explained on the gender-neutral ground of benefiting veterans—not because the impact was insufficiently stark.[304] This reading of *Feeney* would be incorrect if "signal" meant "raise an inference of," rather than "prove," gender discrimination.[305] But the Court likely meant "signal" to mean "prove." The Court explained: "Just as there are cases in which *impact alone* can unmask an invidious classification, *cf.* [*Yick Wo*], there are others, in which—*notwithstanding impact*—the *legitimate non-invidious purposes* of a law cannot be

---

[299] *See id.*

[300] *See supra* Part III.B.1.b.

[301] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) ("[T]his is not a law that can plausibly be explained only as a gender-based classification. . . . Veteran status is not uniquely male. Although few women benefit from the preference the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans-male as well as female- are placed at a disadvantage. Too many men are affected by [the statute], to permit the inference that the statute is but a pretext for preferring men over women.").

[302] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (emphasis added) (citing Washington v. Davis, 426 U.S. 229, 242 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). By "not neutral," the Court meant "gender-based." *See id.* at 274 ("The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based.").

[303] The Court here was considering the plaintiff's impact-alone argument. *See Feeney*, 442 U.S. at 274–75. The Court considered the plaintiff's motivating-factor argument in a different section of its opinion. *See id.* at 276–80.

[304] *See supra* notes 109–112 and accompanying text (explaining that an impact-alone argument requires a stark disparity and also requires that the official act not be explainable on permissible grounds).

[305] *See* Pers. Adm'r of Mass.v. Feeney, 442 U.S. 256, 279 n.25 (1979) (explaining that sometimes a disparity will create an inference of intentional discrimination and that an inference is not synonymous with proof).

missed. This is one."[306] Thus, the Court quite clearly held the impact-alone argument failed because a gender-neutral basis could explain the law, although the law's impact on women was sufficiently stark under the impact-alone test.

Accordingly, if a disparity in a case such as *Ricci* is approximately as stark as the one in *Feeney*,[307] the plaintiff in the *Ricci*-type case would be able to satisfy the stark-disparity prong of the impact-alone test.[308] The remaining issue would be whether the employer's decision to discard or alter test results was not explainable on any ground besides race.[309] If there is no plausible race-neutral explanation, the employer's action would be subjected to strict scrutiny.[310]

V. CONCLUSION

Turning the Equal Protection Clause's principle of equality into a

---

[306] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (emphasis added).

[307] The racial disparity of the *Ricci* employer's decision to discard the test results was not as stark as the disparities in cases such as *Yick Wo*, and some scholars have suggested the disparity was not as stark as the one in *Feeney* either. *See* Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1274–75 (2010) (suggesting the disparity in *Feeney* was more stark than the one in *Ricci*). However, the disparities in *Ricci* and *Feeney* were comparable with each other. The official act in *Feeney* burdened both genders and benefited one gender almost exclusively. Similarly, the official act in *Ricci* benefited people of all racial and ethnic groups that took the test and burdened members of one of those groups almost exclusively.

Of course, if the racial impact of the *Ricci* employer's decision to discard the test results were insufficiently stark under the impact-alone test, the decision could still be deemed race-based due to the employer's admission or under the predominant-factor or motivating-factor test.

[308] *See supra* text accompanying note 112 (explaining the two prongs of an impact-alone argument).

[309] The second prong likely places the burden on the defendant to produce an innocent explanation for the disparity. *See supra* note 112.

[310] *See supra* notes 160, 161, 162 and accompanying text. Recall that proving a racial purpose in an equal-protection claim under the impact-alone theory is significantly more difficult than proving Title VII liability for a racially-disparate impact. The equal-protection claim might require a more stark disparity than the disparate-impact claim does. *See* Washington v. Davis, 426 U.S. 229, 246–48 (1976); *see also supra* Parts II & III.B.1.b. After the plaintiff shows a sufficient racial disparity, the equal-protection claim requires the plaintiff to persuade the court that the disparity is unexplainable on any ground besides race, which is a high burden on the plaintiff. *See supra* note 112; *supra* Part III.B.1.b. By contrast, the disparate-impact doctrine imposes no such requirement but instead requires the defendant to prove that business necessity justifies the policy that resulted in the racial disparity. *See supra* Part II. That is a high burden on the defendant. *See* Ricci v. DeStefano, 557 U.S. 557, 620–24 (2009) (Ginsburg, J., dissenting). If the defendant satisfies that burden, it would still be liable if the plaintiff shows the defendant refused to adopt a policy that would result in a smaller racial disparity. *See supra* Part II.

This footnote summarizes only how a plaintiff may rely solely on a racial disparity to prevail on a Title VII disparate-impact claim or an equal-protection claim. This footnote does not involve the separate issue of how a defendant may attempt to use disparate-impact avoidance as a legal justification for otherwise violating the equal protection clause or Title VII's disparate-treatment provision. *See supra* note 10 and accompanying text.

workable legal doctrine is not easy to do.[311] The current system of tiers of scrutiny is not necessarily wise or justified.[312] Once that framework is accepted, deciding which level of scrutiny should correspond to which particular types of classification requires normative judgments.[313] When a court applies one of those tiers of scrutiny, it must make more normative judgments to decide whether the distinctions between the differently-treated groups are sufficient to justify the different treatment.[314]

Those complexities are somewhat lessened in the employment context because there is widespread agreement that employment decisions should be made based on merit.[315] Although meritocracy might seem in tension with equality because it presumes that people are unequal,[316] it is consistent with the principle of equality, which requires that like people be treated alike. When someone treats more-capable people differently than less-capable people, the principle of equality is satisfied because one group is different than the other in relevant respects.[317] However, determining capability is not necessarily an easy task. Some scholars have argued that the United States is not nearly the meritocracy that many assume it is,[318] partly because many employment decisions are based on impermissible discrimination,[319] sometimes sub-

---

[311] *See* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing A Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 81 (2002) ("[T]he Equal Protection Clause presents massive and unavoidable interpretive difficulties of its own").

[312] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 585 & n.167 (1982).

[313] *See* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing A Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 81 (2002).

[314] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 563 (1982) ("Even if one is disposed to frame constitutional values in terms of equality, therefore, one cannot avoid the task of identifying and assessing the substantive constitutional rights that determine when people are 'alike' and when 'unalike.'"); *see also id.* at 539 n.8 ("[T]o say that goods should be distributed according to merit, or needs, or works, or wants is simply to say that the substantive criterion that defines the respect in which all people are alike is merit, or needs, or works, or wants").

[315] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280 (1979) (noting that there exists a "widely shared view that merit and merit alone should prevail in the employment policies of government"); Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 489 (2003) (quoting Andrew Mason, *Equality of Opportunity, Old and New*, 111 ETHICS 760, 764 (2001)) (noting that meritocracy "is 'an idea that is widely held and deeply embedded in the practices of liberal democracies'"); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1304 (2012) (footnote omitted) (citations omitted) ("It is well-established that the overwhelming majority of Americans—of all groups and races—subscribe to some extent to meritocracy beliefs. Indeed, meritocracy beliefs are so widespread in the United States that they are frequently referred to as the dominant or national American ideology."). *But see See* Susan Lorde Martin, *Patronage Employment: Limiting Litigation*, 49 SAN DIEGO L. REV. 669, 674–77 (2012) (discussing the view that patronage creates a more-capable civil service system than meritocracy does).

[316] *See, e.g.*, Mark Tushnet, *The Meritocratic Egalitarianism of Thurgood Marshall*, 52 HOW. L.J. 691, 691 (2009) ("Meritocracy is sometimes thought to be incompatible with equality because meritocracy implies hierarchy").

[317] *See supra* note 198.

[318] *See, e.g.*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968–97 (1996).

[319] *See* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85

consciously by well-meaning employers.[320] Others have argued that employment tests are unreliable predictors of capability.[321]

But the disparate-impact doctrine is not the answer.[322] That doctrine goes far beyond prohibiting or remedying intentional discrimination,[323] so it causes state action that differentiates among people on the basis of race.[324] That is inconsistent with meritocracy and the equality of a free society.[325] The disparate-impact doctrine's frequent attack on written, objective tests in the employment context[326] is especially troubling because those tests play an important role in preventing discrimination that is more possible under subjective tests.[327]

MINN. L. REV. 587, 599–612 (2000) (arguing that race and sex discrimination still play a significant role in hiring and promotion decisions); *see generally* Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 586 (1996) (arguing that there is still significant gender bias in the legal profession).

[320] Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745–49 (2005); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1284–89 (1995).

[321] Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1261–76 (1995).

[322] Some scholars have argued that whether one supports or opposes the disparate-impact doctrine often hinges on whether one thinks that racial discrimination is still prevalent in American society. *E.g.*, Helen Norton, *The Supreme Court's Post-Racial Turn Towards A Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 201–02 (2010). The doctrine's supporters think it is necessary for smoking out covert discrimination, and the doctrine's opponents think it is unjustified because there is little discrimination to smoke out. *See id.* Perhaps that is where the debate over the disparate-impact doctrine mainly lies, but that is not where it should lie because smoking out *intentional* discrimination is not the doctrine's purpose. *See supra* note 37 and accompanying text. The main problem with the disparate-impact doctrine is that its burdens of proof allow a plaintiff to prevail without proving racial discrimination to an acceptable degree of certainty. *See supra* note 309. By contrast, the burdens of proving racial discrimination in an equal-protection claim are appropriate because they are high enough to ensure that a plaintiff prevails only upon proving that such discrimination actually occurred. *See supra* note 309 and *supra* Part III.B.1. This argument against the disparate-impact doctrine does not hinge on how much intentional racial discrimination still happens in the United States, since this argument does not hinge on how many disparate-impact plaintiffs prevail against defendants innocent of such discrimination. Instead, this argument focuses on the danger that a defendant innocent of such discrimination will nevertheless be found liable therefor. As a matter of principle, that danger makes the disparate-impact doctrine unacceptable. If racial discrimination is rare in the United States, that fact would support this argument about burdens of proof, but this argument can stand alone without any resort to empiricism. By analogy, allowing a criminal defendant to be convicted if a preponderance of the evidence proves his guilt would be unacceptable, even if the same number of wrongful convictions occurred under that burden of proof as under the beyond-a-reasonable-doubt standard. That lower standard would be improper as a matter of principle because it creates too much of a danger of wrongful conviction. Similarly, the disparate-impact doctrine creates too much of a danger that an innocent defendant will be wrongly held liable for racial discrimination, a very serious determination.

[323] *See supra* note 37 and accompanying text.

[324] *See supra* Part IV. *Cf. supra* note 252 (explaining why remedying intentional discrimination complies with equal protection).

[325] *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[326] *E.g.*, Ricci v. DeStefano, 557 U.S. 557, 633 (2009) (Ginsburg, J., dissenting); Doreen Canton, *Adverse Impact Analysis of Public Sector Employment Tests: Can A City Devise A Valid Test?*, 56 U. CIN. L. REV. 683, 683 (1987).

[327] *See* Doreen Canton, *Adverse Impact Analysis of Public Sector Employment Tests: Can A City Devise A Valid Test?*, 56 U. CIN. L. REV. 683, 683 & n.3 (1987) ("'Little will be gained by

If a plaintiff can prove that an employment test intentionally discriminated on a suspect basis, such as race, then a court may invalidate the test on that ground.[328] But if a test falls short of such discrimination, then the employer may voluntarily decide to replace the test with one that better measures job-related ability.[329] Using the disparate-impact doctrine to invalidate an employment test that does not entail such discrimination has a tendency to produce racial quotas or other forms of racial balancing,[330] which are "patently unconstitutional."[331]

---

minorities if courts so discourage the use of tests that the doors to political selection are reopened.'") (quoting Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1022 (1st Cir. 1974)).

[328] *See supra* notes 7 & 35 and accompanying text; *see also supra* note 252.

[329] *See* Ricci v. DeStefano, 557 U.S. 557, 644 (2009) (Ginsburg, J., dissenting) ("These cases present an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place."); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 83 (2009) (supporting "the voluntary, non-preferential efforts by public or private employers to eliminate policies and practices that tend to limit equal employment opportunities without adequate business or public policy justification"); Hayden v. Cnty. of Nassau, 180 F.3d 42, 54 (2d Cir. 1999) (designing an entrance examination with race-neutral means to mitigate racial disparities of past examinations "do[es] not discriminate against non-minorities"). By refusing to use a particular test again, an employer does not differentiate among employees, so a lawsuit that challenges this decision would not proceed past "step one." *See also supra* note 57 (discussing equal-protection cases that failed to proceed past "step one").

[330] Ricci v. DeStefano, 557 U.S. 557, 581–82 (2009); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 74–75 (2009). *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988) (plurality opinion) ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability [for disparate impact], such measures will be widely adopted."); Biondo v. City of Chicago, Ill., 382 F.3d 680, 684 (7th Cir. 2004) ("If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm[.]").

[331] Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

Exploring Viable Options for Class Actions for Underrepresented African-American Professors in American Universities Post-*Wal-Mart v. Dukes*

Rachel Santarelli

I. INTRODUCTION

In recent decades, racial differences in faculty salaries, tenure, and academic rank have become prominent issues in our educational landscape.[1] Next to Hispanics, African Americans account for the smallest percentage of college and university faculty in the United States.[2] Many of the colleges and universities in the United States do not have any African-American faculty members, and an even greater number of them do not employ any tenured African-American faculty.[3] Because of declining enrollment, greater financial pressures, and an increasing emphasis on funded research, achieving tenure at major institutions of higher learning has become a highly-selective process.[4]

Faculty salaries are "primarily determined by an individual's qualifications, including their level of educational attainment, length of service and experience, scholarly productivity, amount of administrative responsibilities, and teaching performance."[5] "[F]aculty who are equal in these attributes of human capital and who work in comparable institutions should have equivalent tenure and rank and receive equal pay regardless of their gender or their race/ethnicity."[6]

Research suggests that the underrepresentation of African-American professors in universities is "not completely and consistently explained by experience, productivity, and performance."[7] Discrimination continues[8] decades after the passage of the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 (Title VII), both of which prohibit discrimination in employment.[9] Just four percent of professors are African-American,[10] whereas African Americans comprise 13.2% of the United States population.[11] State and federal courts have recognized the importance of safeguarding academic freedom in institutions of higher learning,[12] but they have not yet

---

[1] ELLEN M. BRADBURN ET AL., SALARY, PROMOTION, AND TENURE STATUS OF MINORITY AND WOMEN FACULTY IN U.S. COLLEGES AND UNIVERSITIES 1 (2000).

[2] *Id.* at 11.

[3] *Id.*

[4] *Id.*

[5] BRADBURN, *supra* note 1, at 1.

[6] *Id.*

[7] *Id.* at 1.

[8] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004) (finding that resumes with white-sounding names received fifty percent more callbacks than those with African-American-sounding names, even though the resumes were essentially the same).

[9] The Equal Pay Act of 1963, 29 U.S.C. § 206 (West 2014); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

[10] STATE & CENSUS QUICK FACTS, U.S CENSUS BUREAU (last updated Feb. 5, 2015, 1:11 PM), http://quickfacts.census.gov/qfd/states/00000.html.

[11] *Id.*

[12] The U.S. Supreme Court has recognized a First Amendment right of institutional academic freedom: "It is the business of a university to provide that atmosphere which is most conducive to

attempted to impose promotion and tenure standards on U.S. colleges and universities.[13] However, the courts have recognized that the subjective nature of academic personnel evaluation decisions creates the potential for race-based, as well as other types of, discrimination.[14]

Despite statutory schemes prohibiting discrimination, fear of retaliation may deter individual plaintiffs from bringing employment discrimination claims.[15] An additional deterrent is the financial risk.[16] Class actions, pursuant to Federal Rule of Civil Procedure Rule 23 (Rule 23), are useful to plaintiffs subject to employment discrimination. Ultimately, the class action permits "individuals to pool their resources, which allows them to share litigation risks and burdens," helping to motivate and inspire confidence in individual class members.[17] However, availability of a class action for employees subject to discrimination has been compromised throughout our history with various interpretations by the courts. The Supreme Court sought to settle Rule 23's class certification requirements through *Wal-Mart v. Dukes*,[18] resulting in a strict interpretation.[19]

This Note will first provide a historical background of employment discrimination law and how it has evolved throughout recent decades. Next, this Note will discuss class actions. It will consider their uses, case law regarding their statutory interpretation by the courts, and end with a discussion of the Court's decision in *Wal-Mart*. Finally, it will substantively discuss how this controversial decision will affect plaintiffs, specifically underrepresented African-American professors, and opportunities to bring a viable class action pursuant to Rule 23.

---

speculation, experiment, and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citations omitted). *See also* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., concurring) ("The [academic] freedom of a university to make its own judgments as to education includes the selection of its student body.").

[13] Jacques J. Parenteau, *How Universities and Colleges Undermine the Defense of Tenure Denial Cases*, http://www.mppjustice.com/tenure_denial.htm, <http://perma.cc/TL9E-QD8Q>.

[14] *Id.*

[15] Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 631 (2011) [hereinafter Malveaux].

[16] *See* Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011) [hereinafter *Goliath*] (arguing that "those with small claims and limited resources are unlikely to challenge powerful corporations on their own . . . .").

[17] Malveaux, *supra* note 15, at 631; *see also Goliath*, *supra* note 16, at 37 (explaining how when individuals with small claims refrain from challenging large corporations, this "effectively immuniz[es] companies from complying with the law.").

[18] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

[19] *See infra* Part III.

II. OVERVIEW OF EMPLOYMENT DISCRIMINATION LAW AND CLASS ACTION

The Equal Pay Act,[20] signed in to law by President John F. Kennedy on June 10, 1963, was one of the first federal anti-discrimination laws that addressed wage differences based on gender.[21] Under the statute, similarly-situated female and male employees must receive equal pay for equal work, unless the pay differential is attributable to one of four exceptions: a seniority system, a merit system, a system that measures by quantity or quality of production, or "any other factor other than sex."[22] Congress proceeded with understandable caution; the initial sweep of the statutes was not all encompassing.

A. Title VII

A year after Congress passed the EPA, it enacted the influential Title VII, which laid down the first general constraint against employment discrimination contained within federal law.[23] It provided broader protections, some of which overshadowed the narrow scope of the EPA.[24] The EPA specifically addresses sex-based wage discrimination, whereas Title VII prohibits discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin."[25] Title VII's objective is "plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[26]

Congress charged The Equal Employment Opportunity Commission (EEOC) with the power to investigate discrimination charges, to seek voluntary compliance through conciliation, and to institute civil actions to enforce Title VII's provisions.[27] For an individual to bring suit under Title VII, however, he must first exhaust the Act's administrative requirements.[28] Title VII provides plaintiffs

---

[20] 29 U.S.C. § 206 (West 2014).

[21] *Equal Pay Act of 1963*, NATIONAL PARK SERVICE, http://www.nps.gov/subjects/civilrights/equal-pay-act-1963.htm, <http://perma.cc/4JRN-S4H4>.

[22] 29 U.S.C. § 206(d)(1) (West 2014).

[23] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

[24] *Compare* 29 U.S.C. § 206(d)(1) (specifically addressing sex based discrimination), *with* Title VII § 2000e-2 (a)(1), (a)(2) (prohibiting discrimination with respect to compensation terms conditions or privileges).

[25] Title VII § 2000e-2(a)(1), (a)(2).

[26] Griggs v. Duke Power, 401 U.S. 424, 429–30 (1971).

[27] 42 U.S.C. § 2000e-5(a), (b), (f)(1) (1981).

[26] An aggrieved party must file a charge with the EEOC within 180 days. 42 U.S.C. § 2000e-5(b), (f)

injunctive relief and back pay for a two-year period.[29] The Act also allows for the prevailing party to recover attorneys' fees.[30]

B. Disparate Treatment and Disparate Impact

The class-action lawsuit is valuable for employees looking to fight system-wide employment discrimination. A class of people alleging disparate treatment or disparate impact may bring a claim against an employer under Title VII. Title VII has burden of proof requirements based upon alternative theories of "disparate impact" and "disparate treatment."[31] In order to prevail on a disparate treatment claim, a class must prove defendants acted with a discriminatory motive, although motive is inferable merely from differences in treatment.[32] In a disparate impact case, a class must demonstrate that employment practices or policies, which are facially-neutral in their treatment of different groups, actually treat one group more harshly than another in a manner that cannot be justified by business necessity.[33]

Employment discrimination can be shown by what is referred to as "pattern or practice."[34] To establish a pattern or practice of disparate treatment, for purposes of a discrimination claim under Title VII, the class must show that the defendant regularly and purposefully treated members of the protected group less favorably,[35] and intentional discrimination was the employer's standard operating procedure.[36] The class can prove this through a combination of statistics and anecdotes.[37]

(West 2014). If the EEOC does not complete its investigation within 180 days of the filing of the charge, a plaintiff can immediately request a right-to-sue letter at that time. The EEOC will then stop its investigation and issue the Notice of Right to Sue. 42 U.S.C. § 2000e-5(b) (West 2014). If the EEOC finds reasonable cause for the charge, it pursues conciliation through conference. *Id.* If these efforts fail, the EEOC notifies the complainant of his right to sue in a federal court. 42 U.S.C. § 2000e-5(f) (West 2014). In addition, the EEOC may recommend to the Attorney General that he bring suit. *Id.* § 2000e-6(f) (1981).

[29] *See id.* § 2000e-5 (g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.").

[30] *Id.* § 2000e-5(k) (West 2014).

[31] *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2676 (2009).

[32] *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

[33] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[34] *Teamsters*, 431 U.S. at 336 (noting that pattern or practice may be established "by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure, the regular rather than the unusual practice.").

[35] Morgan v. United Parcel Serv. of Am., Inc., 380 F.3d 459, 463 (8th Cir. 2004).

[36] Cooper v. S. Co., 390 F.3d 695, 716, 724 (11th Cir. 2004).

[37] *Id.* at 724.

A class who raises a pattern-or-practice discrimination claim against an employer has the initial burden of demonstrating that unlawful discrimination has been the regular policy of the employer, that is, that the discrimination was the company's regular, rather than unusual, practice. Once a plaintiff establishes a prima facie case[38] based on a pattern-or-practice theory, the burden shifts to the employer to defeat the showing by demonstrating that the plaintiff's proof is inaccurate or insignificant, or by providing a nondiscriminatory explanation for the apparently discriminatory result.[39]

If the defendant satisfies its burden of production in a pattern-or-practice case under Title VII, the trier of fact must then determine, by a preponderance of the evidence, whether the employer engaged in a pattern or practice of intentional discrimination.[40]

C. Class Actions

Individual plaintiffs face a variety of obstacles when confronted with the prospect of bringing an employment discrimination claim against their employer.[41] A potential plaintiff will likely face a large risk of heavy financial burden coupled with a long period of litigation.[42] These are both significant impediments, particularly to low-wage employees.[43] Further obstacles include fear of retaliation by an employer, or a simple lack of knowledge regarding legal services available to someone pursuing an employment discrimination claim.[44]

Because such barriers may seem so insurmountable to a potential plaintiff, rarely does an individual consider the discrimination severe enough to seek litigation. Ultimately, utilizing the class action vehicle permits "individuals to pool their resources, which allows them to share litigation risks and burdens," helping to motivate and inspire confidence in individual class members.[45]

---

[38] It is settled that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School Dist. v. U.S., 433 U.S. 299, 307–08 (1977); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir.1980). The usefulness of statistics however, "depends on all the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340.

[39] Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985). *See* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587 n.13 (1979) (employer must show its rule is a means which significantly serves its goal).

[40] *Id.*

[41] *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporation Behavior: Hearing Before the Committee on the Judiciary, United States Senate* (2011) (statement of Co-President for the National Women's Law Center, Marcia D. Greenburger).

[42] *Id.*

[43] *Id.*

[44] *See* Malveaux, *supra* note 15, at 631 (explaining that "the class action creates a more level playing field between an employer and employee.").

[45] *See id.* at 640 (explaining that when individuals with small claims refrain from challenging large corporations, they "effectively immunize companies from complying with the law").

Furthermore, class actions also help to decrease the burden on the court system.[46] Many plaintiffs may bring one action that greatly consolidates overlapping pleadings and discovery requests.[47] By joining these claims into one class action, it gives the court a chance to hear all of them together. Unfortunately, however, it is becoming increasingly difficult to bring a class action pursuant to Rule 23 since the Court's decision in *Wal-Mart*.

In order to maintain a class action, a court must certify the class pursuant to Rule 23.[48] Certification requires a putative class to establish the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation. As subdivision (a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[49]

Additionally, the class action may only be certified if the action satisfies one of the three circumstances outlined under Rule 23(b): (1) Prosecution of separate suits would create the risk of inconsistent or conflicting judgments, or judgments that would substantially impair the interests of unnamed or absent class members;[50] (2) injunctive or declaratory relief is appropriate on a class-wide basis;[51] or (3) common questions of law or fact predominate over unique or individual claims, and if the maintenance of a class action is superior to other available methods of adjudication.[52] Although these rules seem fairly straightforward, the courts' interpretations of these requirements have been a topic of controversy for several decades.

1. *The Across-the-Board Approach—Before* Falcon

In 1969, the Fifth Circuit announced the so-called "across-the-

---

[46] *Id.* at 631–32.

[47] *Id.*

[48] FED. R. CIV. P. 23.

[49] FED. R. CIV. P. 23(a).

[50] *See* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 310 (2001).

[51] The advisory committee's notes to Rule 23 describe typical (b)(2) actions as those "in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69, 102 (1966).

[52] FED. R. CIV. P. 23(b).

board" rule in *Johnson v. Ga. Highway Express, Inc.*,[53] igniting the controversy over Title VII class certification. In this case the plaintiff, an African-American employee that was discharged, sought to represent all of the defendant's African-American employees, including those not discharged, in an action alleging a company-wide policy of racial discrimination in hiring, firing, promotion, and maintenance of facilities. The pleadings mounted a broad attack on unequal employment practices, which the employer allegedly engaged in pursuant to a policy involving racial discrimination.[54] The court held that it was improper to restrict members of class represented by plaintiff to other discharged African-American employees, rather than all African-American employees.[55]

The Court set a new precedent by certifying the class: a Title VII plaintiff could represent all members of a group allegedly harmed by an employer's discriminatory practices, including employees who worked in different positions or in different facilities than the plaintiff.[56] To be a Title VII plaintiff, an employee only must have been "subject to one discriminatory employment practice [and] seek[] to represent employees who were subject to another discriminatory employment practice by the same employer."[57]

For many years, the majority of courts followed this approach, exercising a liberal and less stringent interpretation of the Rule 23(a) threshold requirements when certifying employment discrimination lawsuits.[58] By the late 1970s, courts began to note the risks arising from "the liberal view that class actions have been accorded in Title VII context."[59] Courts began to apply Rule 23 more stringently, particularly after the Supreme Court observed that "careful attention to the requirements of [Rule 23] remains nonetheless indispensable," despite

---

[53] *See* Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) ("The first point raised by appellant involves the district court's narrowing of the class, i.e., that the appellant, a discharged Negro employee, could only represent other discharged Negro employees. This was error as it is clear from the pleadings that the scope of appellant's suit is an 'across[-]the[-]board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination.").

[54] *Id.*

[55] *Id.*

[56] Rodriguez v. E. Tex. Motor Freight Sys., 505 F.2d 40 (5th Cir. 1974), *vacated*, 431 U.S. 395 (1977).

[57] Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH L. REV. 1087, 1097 (2012) (citing Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 350 (2010)).

[58] *See, e.g.*, Payne v. Travenol Labs., Inc., 565 F.2d 895, 899–900 (5th Cir. 1978) (holding that plaintiffs' class action could properly extend to the employment practices applicable to the positions subject to the college degree requirement even assuming that the named plaintiffs were not strictly affected thereby in that they allegedly lacked the level of capability required for those positions); Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (1969) (applying the across-the-board rule and allowing the plaintiff to bring suit on behalf of a larger class of employees, as the plaintiff alleged discriminatory practices).

[59] Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631, 645 (D. Md. 1978). When considering the plaintiff's motion for class certification, the court attempted to strike a balance between "an awareness of the pitfalls of certifying an overbroad class" and "a view toward the liberality extended to Title VII class actions." *Id.* at 639.

the awareness that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."[60] Responding to these observations, the court categorically abrogated the liberality once applied to the certification of Title VII class actions in *General Telephone Company of the Southwest v. Falcon*.

2. General Telephone Company of the Southwest v. Falcon *Decision*

General Telephone Company of the Southwest v. Falcon was an employment discrimination suit brought under Title VII by a Mexican-American employee against his employer alleging discrimination in hiring and promoting.[61] The plaintiff sued on behalf of a class including Mexican Americans who had been denied employment altogether.[62] The Court of Appeals for the Fifth Circuit, using the across-the-board approach, upheld the district court's certification of the class.[63] The Supreme Court ultimately rejected this approach, [64] distinguishing the issue regarding an individual that has allegedly been harmed by an employer's promotion practices from that of whether an individual's claim is similar to that of the rest of the class.[65] The Court stated, "[t]he district court's error was a failure to evaluate carefully the legitimacy of named plaintiff's plea that he was a proper class representative."[66] Further, the Court was particularly concerned that if it allowed the across-the-board approach, "every Title VII case would be a potential company-wide class action."[67]

The Court stated that nothing in Title VII indicated "that Congress intended to authorize such a wholesale expansion of class-action-litigation."[68] Additionally, the Court stated "that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[69] The court observed:

> [T]here is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and

---

[60] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (reversing class certification on the basis that plaintiffs were not proper class representatives in race and national origin discrimination case).

[61] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 149 (1982).

[62] *Id.*

[63] *Id.* at 155.

[64] *Id.* at 161.

[65] *Id.* at 157

[66] *Id.* at 160.

[67] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 (1982).

[68] *Id.*

[69] *Id.* at 161.

> his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.[70]

Therefore, *Falcon* emphatically diminished the liberal certifications of Title VII class actions, and the influence of "rigorous analysis" resounded well into the 1990s.[71] The court did not conclusively seal the controversy in its opinion of *Falcon*;[72] in footnote fifteen of the opinion, the court "provide[d] a loophole for private litigants":

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.[73]

Many courts have viewed the footnote as suggesting an exception to Falcon's requirements of rigorous analysis.[74] If the plaintiff can prove the employer used a policy of entirely-subjective decision-making, then the exception is "triggered,"[75] and commonality and typicality are presumed to be satisfied.[76] To determine if a policy fits within the exception, the court will focus on whether the employer's policies are entirely subjective.[77]

3. *After* Falcon

Predictably, the Court's lack of clarifying standards caused lower

---

[70] *Id.* at 157.

[71] *See, e.g.*, Int'l Union v. LTV Aerospace & Def. Co., 136 F.R.D. 113, 122–25 (N.D. Tex. 1991) (limiting certification to a subclass of employees in Title VII sex discrimination case); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291–93 (2d Cir. 1999) (applying rigorous analysis to deny certification to employees in Title VII sexual harassment case).

[72] Robert P. Monyak, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling* General Telephone Co. v. Falcon *with* Hill v. Western Electric Co., 1983 Duke L.J. 821, 826 (1983).

[73] *Id.* at 826–27 (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 158 n.15 (1982)).

[74] *Id.*

[75] Garcia v. Veneman, 224 F.R.D. 8, 14 (D.D.C. 2004) (explaining that "footnote 15 was not triggered" because the defendant used objective factors in the decision-making process).

[76] *Id.*

[77] *See, e.g.*, Vuyanich v. Republic Nat'l Bank of Dall., 723 F.2d 1195, 1199–1200 (5th Cir. 1984) ("The district court's finding that the Bank relied on two objective inputs—education and experience—in its necessarily subjective hiring process . . . precludes reliance on this 'general policy of discrimination' exception.") (citation omitted).

courts to struggle with its application.[78] Courts apt to grant certification focused on broad language in *Falcon* that "common questions of law or fact are typically present" in race discrimination questions.[79] These courts then tended to distinguish *Falcon* on its facts, and interpreted footnote fifteen to permit certification through mere allegations of a policy or practice extending class-wide.[80] On the other hand, courts such as the one in *Churchill v. International Business Machines, Inc.*,[81] leaned on the side of strict compliance. In that case, a New Jersey district court denied certification and concluded that anonymous affidavits alleging general sex-based salary discrimination "failed the requirement of *Falcon* to bridge the conceptual 'wide gap' between the plaintiffs' claim and the existence of a purported class of aggrieved persons who have suffered the same discrimination."[82]

III. *WAL-MART* DECISION

Nearly three decades later, the issue of commonality reached the Supreme Court once again in the landmark case of *Wal-Mart v. Dukes*.[83] This landmark case began when a large group of female Wal-Mart workers claimed that their behemoth employer was discriminating against them on the basis of their sex.[84] In June 2001, the three named plaintiffs, Betty Dukes, Christine Kwapnoski, and Edith Arana,[85] brought suit against Wal-Mart in the United States District Court for the Northern District of California in San Francisco.[86] The plaintiffs sought to represent 1.5 million women, including women who were currently working or who had worked in a Wal-Mart store any time since December 26, 1998.[87] Plaintiffs brought both a disparate impact claim and a "pattern-or-practice" disparate treatment claim against Wal-Mart.[88]

According to the plaintiffs, Wal-Mart's policy of giving local managers broad discretion over pay and promotions disproportionately favored men and thus amounted to a disparate impact.[89] Furthermore, the plaintiffs alleged that Wal-Mart was aware of the policy's effect on its

---

[78] *Id.*

[79] *See, e.g.*, Card v. City of Cleveland, 270 F.R.D. 280, 293–94 (N.D. Ohio 2010) (certifying the common question of "whether Defendant's pattern or practice of utterly failing to promote women to the position of WPO violates Title VII").

[80] *See, e.g.*, Cox v. Am. Case Iron Pipe Co., 784 F.2d 1546, 1558 (11th Cir. 1986) (distinguishing *Falcon* on its facts).

[81] Churchill v. Int'l Bus. Machs., Inc., 759 F. Supp. 1089, 1101 (D.N.J. 1991).

[82] *Id.* (quoting *Falcon*, 457 U.S. at 157–58).

[83] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2548 (2011).

[84] *Id.* at 2547–48.

[85] *Id.*

[86] *Id.* at 2549.

[87] *Id.* at 2547, 2549.

[88] *Id.* at 2548.

[89] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2548 (2011).

female employees and failed to restrain the widespread misuse of its managers' discretionary authority, leading to disparate treatment of female employees.[90] The crux of the plaintiffs' allegations, however, rested with the latter theory.[91] More specifically, they alleged disparate treatment on a systemic, rather than individual level.[92] Their main argument was that Wal-Mart, as a corporate entity, knew that its employment practices were creating disparities between its male and female employees.[93]

Plaintiffs asserted that while women at Wal-Mart "comprise over 80% of hourly supervisors, they hold only one-third of store management jobs and their ranks steadily diminish at each successive step in the management hierarchy."[94] Plaintiffs produced three primary sources of evidence in support of their assertion: the testimony of an expert witness, statistical evidence of pay disparities between men and women at Wal-Mart, and reports of discrimination from almost 120 female employees.[95] Specifically, they submitted "extensive evidence of excessive subjectivity in personnel decisions, guided by a strong corporate culture infused with sexual stereotyping; centralized oversight of decision making; robust statistical evidence of gender disparities caused by discrimination; and anecdotal evidence of gender bias."[96]

Plaintiffs introduced substantial evidence in support of class certification, including 200 depositions, electronic personnel data, and more than a million pages of documents.[97] Their statistical evidence showed that women were paid significantly less than men in every one of Wal-Mart's forty-one regions, and this pay gap continued to increase every year.[98] Additionally, Plaintiffs presented an expert witness, Dr. William Bielby.[99] He concluded that Wal-Mart's corporate culture—in terms of personnel policies and practices—is a uniform practice.[100] With this substantial amount of evidence, Plaintiffs believed they had met their burden.

In response, Wal-Mart argued that Plantiffs's evidence failed to meet the requirement for class certification pursuant to FRCP 23.[101] First, Wal-Mart claimed that its company-wide policy "expressly bars discrimination based on sex."[102] Wal-Mart then turned to the plaintiffs' statistical evidence and argued that it was misleading because the data

---

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Brief for Respondent at *2, Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011) (No. 10-277).
[95] *Id.* at *6–7.
[96] *Id.* at *5.
[97] *Id.* at *10–11.
[98] *Id.* at *22.
[99] *Id.* at *35–36.
[100] Brief for Petitioner at *35–36, Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011) (No. 10-277).
[101] *Id.* at *34.
[102] *Id.* at *3.

was aggregated nationally, meaning that it did not show any pay differentials locally.[103] Wal-Mart also presented expert testimony providing that ninety percent of its stores had no pay differentials.[104] Wal-Mart claimed that the plaintiffs' expert testimony was inconclusive in terms of the existence of "stereotyped thinking" by managers.[105] Wal-Mart characterized the anecdotal evidence from current and former employees as "widely divergent."[106] But most significantly, Wal-Mart argued that the "[p]laintiffs . . . never offered significant proof" of a discriminatory, company-wide pay and promotion framework, and that "millions of discretionary decisions by tens of thousands of individual managers around the country defy common treatment under Rule 23(a)."[107] All in all, Wal-Mart argued that plaintiffs failed to prove that the defendant intended to carry out discriminatory practices toward women, as was required for the certification of Title VII class actions.[108] This argument ultimately prevailed before the Supreme Court.

In the majority opinion, Justice Scalia articulated the commonality standard as follows:

> [t]heir claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.[109]

The Court conclusively found that class certification was inappropriate because the plaintiffs' claims involved employment decisions taken at numerous different stores and by numerous decision makers.[110] As a result, they could not show that their claims for relief would "produce a common answer" to the question of why they received unfavorable treatment.[111] After this case was settled,

> The Chamber of Commerce immediately issued a press release declaring it "the most important class action case in more than a decade." By contrast, the Christian Science Monitor called the case "a major blow to working women" and a "sign that some of the esteemed judges on our nation's highest court need a primer in how contemporary

---

[103] *Id.* at *7.
[104] *Id.*
[105] *Id.*
[106] Brief for Petitioner at *8, Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011) (No. 10-277).
[107] *Id.* at *11.
[108] *Id.*
[109] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2551 (2011).
[110] *Id.* at 2552.
[111] *Id.*

> discrimination functions." In an interview on National Public Radio, a prominent plaintiff's lawyer called the case "a disaster not only for civil rights litigations but for anyone who wants to bring a class action," and commented "[t]he five-male majority decision today represents a jaw-dropping form of judicial activism."[112]

A. Before and After

Before *Falcon*, some federal courts applied an across-the-board approach to the Rule 23 commonality and typicality requirements, which allowed plaintiffs alleging one type of employment discrimination to represent a class asserting several different types of employment discrimination.[113] Other federal courts, however, refused to adopt this across-the-board approach.[114]

In *Falcon*, the Court rejected the across-the-board rule and limited plaintiffs' ability to gain class certification under Rule 23.[115] The Court held that proof that the employer discriminated against the plaintiff in some way did not justify the inference that discriminatory treatment typifies the employer's promotion practices, pervades the company, or exists in other practices of the employer.[116] However, the Court provided a loophole for litigants reaching for class certification with its footnote fifteen.[117]

B. *Wal-Mart* under *Falcon*'s Decision

In *Wal-Mart*, the Court described the *Falcon* decision as "the

---

[112] Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 433–34 (2012).

[113] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982) ("A Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."). Prior to *Falcon*, the Court warned the lower courts about their relaxed application of Rule 23. In *East Texas Motor Freight Sytems, Inc., v. Rodriguez*, 431 U.S. 395 (1977), the Court stated that even in discrimination class actions "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains . . . indispensable." *Id.* at 403. The circuit courts, however, interpreted *East Texas Motor* in a variety of ways and several circuit courts continued to use liberal certification standards and allow across-the-board classes.

[114] *Falcon*, 457 U.S. at 161.

[115] *Id.* at 160–61.

[116] *Id.*

[117] *See* Monyak, *supra* note 72, at 827 ("In addition, footnote fifteen of the *Falcon* opinion provides a loophole for private litigants: 'Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.'") (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

proper approach to commonality. . . . [T]he conceptual gap between an individual's discrimination claim and 'the existence of a class of persons who have suffered the same injury . . .'"[118] must be bridged by "significant proof" that an employer "operated under a general policy of discrimination."[119]

The court found no such proof in *Wal-Mart*.[120] It went on to analyze Wal-Mart's general policy, which forbids sex discrimination, and provides for penalties for denials of equal opportunity.[121] The only evidence that the Respondents brought forward of a general discrimination policy was a sociologist's analysis, "asserting that Wal-Mart's corporate culture made it vulnerable to gender bias."[122] But because he could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking, the testimony did not amount to "significant proof" necessary to show that Wal-Mart operated under a general policy of discrimination.[123]

The Court distinguished its decision from *Falcon*.[124] In essence, *Falcon* characterized an "entirely subjective decision-making process" as an example of a "general policy of discrimination."[125] Under *Falcon*, the term "policy" encompassed the employer's actual practices—"it is noteworthy that Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination."[126] Contrarily under *Wal-Mart*, the term "policy" appears to refer to the employer's formalized policy, whether actualized or not.[127] The Court found that a general policy of discrimination was "entirely absent" since "Wal-Mart's announced policy forbids sex discrimination," and that was the end of the analysis.[128] Furthermore, the Court held that under *Falcon*'s footnote fifteen, regarding subjective employment practices, a plaintiff must now "identif[y] a common mode of exercising discretion that pervades the entire company . . . ."[129] Fundamentally, plaintiffs must provide evidence that each class member was similarly affected by the subjective practice.[130]

Specifically, *Wal-Mart* requires either a test that produces a common result[131] or evidence of a general policy of discrimination.[132]

---

[118] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2545 (2011) (quoting *Falcon*, 457 U.S. at 157–58, 159 n.15).
[119] *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).
[120] *Id.* at 2553.
[121] *Id.*
[122] *Id.* at 2545
[123] *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).
[124] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2545 (2011).
[125] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982).
[126] *Id.*
[127] *Wal-Mart*, 131 S.Ct. at 2563–64.
[128] *Id.* at 2553.
[129] *Id.* at 2554–55.
[130] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2554–55 (2011)
[131] *Id.* at 2541.
[132] *Id.* at 2545.

The Supreme Court further concluded that a policy of discretionary decision making does not qualify as a "general policy of discrimination."[133] Rather, a policy of decentralization "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices."[134]

As unattainable as a class action seems post-*Wal-Mart*, the possibility of bringing a disparate treatment claim under "pattern or practice" by using evidence of subjective discriminatory decision-making was not erased. The Court's view of commonality consequently creates a higher standard necessary for class certification by requiring considerably more demanding evidentiary proof to satisfy the requirement of commonality.

IV. AFRICAN-AMERICAN PROFESSORIATE

This higher standard has made it more challenging than ever for plaintiffs to successfully bring a class action. This Note will now turn to a discussion of the impact this change has had on African-American professors and their now undeniable burden of overcoming the commonality requirement set by the Court in *Wal-Mart*. Specifically, the Court's decision in *Wal-Mart* significantly impacts "plaintiffs who wish to suggest that the persistent underrepresentation of African Americans on university faculties—often demonstrable by statistical evidence—is an indication of systematic disparate treatment."[135] Due to the highly subjective and multi-faceted criteria factoring in the decision-making process for professors' appointment and tenure, it will be very difficult for enough African-American professors to "identif[y] a common mode of exercising discretion that pervades" an institution.[136]

A. Tenure

Tenure provides a level of job security and status that faculty members can achieve upon successful completion of a six to eight year probationary period that is unique and peculiar to academia.[137] It is

---

[133] *Id.*

[134] *Id.* at 2554.

[135] Loftus C. Carson, *Employment Opportunities and Conditions for the African-American Legal Professoriate: Perspectives From the Inside*, 19 TEX. J. C. L. & C. R. 1, 93 (2013).

[136] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2554–55 (2011).

[137] *See* Jared L. Bleak, *On Probation: The Pre-Tenure Period*, *in* POLICIES ON FACULTY APPOINTMENT: STANDARD PRACTICES AND UNUSUAL ARRANGEMENTS 18, 18–19 (Cathy A. Trower ed., 2000) (explaining that a seven-year tenure clock is typical at most institutions, meaning that

important to note, however, that not all faculty members are eligible for tenure, regardless of the strength of their performance.[138] When a faculty member is hired at a college or university, she is hired into one of two broad categories: a tenure-track position or a non-tenure-track position.[139] There are several benefits to tenure-track positions. Typically, once a person receives tenure, she cannot lose her job without cause or for a reason prohibited by law.[140]

In contrast, faculty who have not yet received tenure, or faculty who are not on the tenure track, can lose their jobs for many different reasons—poor performance and budget cuts provide good examples of these.[141] In addition to job security, tenure-track or tenured positions have a higher status within the institution and are conferred more benefits, such as increased academic freedom, private office space, reductions in one's teaching load to allow time for conducting research, and statistically higher salaries.[142]

Many different decision makers have a hand in deciding a university employee's raise in salary, promotion, tenure, renewal of appointment, or non-renewal of appointment.[143] The responsibility for preparing recommendations for salary rates, promotion, tenure, renewal of appointment, or non-renewal of appointment rests with the budget council of the university, and administrative officers then give consideration to all recommendations.[144] Next, "all recommendations shall be forwarded to the President for final evaluation and decision."[145] The President's decisions with regard to salary advancement, promotion in rank, award of tenure, and renewal of appointment are subject to

---

faculty become eligible for tenure in their seventh year of employment at the institution but also noting that the "clock" differs from institution to institution).

[138] *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, AM. ASS'N OF U. PROFESSORS, http://www.aaup.org/report/statement-procedural-standards-renewal-or-nonrenewal-faculty-appointments, <http://perma.cc/5532-CPE6>.

[139] *Id.*

[140] Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROBS. 325, 325 (1990).

[141] *Should Teachers Get Tenure?*, PROCON.ORG (September 29, 2014, 7:35 AM), http://teachertenure.procon.org/view.answers.php?questionID=001616.

[142] Judith M. Gappa, *The New Faculty Majority: Somewhat Satisfied, But Not Eligible for Tenure*, 105 NEW DIRECTIONS FOR INSTITUTIONAL RES. 77, 77–86 (2000).

[143] *See, e.g.*, *Recommendations Regarding Faculty Compensation, Faculty Promotion, Tenure, Renewal of Appointment, or Nonrenewal of Appointment*, UNIVERSITY POLICY OFFICE, https://www.policies.utexas.edu/policies/recommendations-regarding-faculty-compensation-faculty-promotion-tenure-renewal-appointment, <http://perma.cc/JV4E-JXFB>; *The University of Iowa Operations Manual*, THE UNIVERSITY OF IOWA, http://www.uiowa.edu/~our/opmanual/iii/10.htm, <http://perma.cc/A8ZE-M2NC>; *University of Alaska Board of Regents' Policy and University Regulation*, UNIVERSITY OF ALASKA, https://www.alaska.edu/bor/policy-regulations/, <https://perma.cc/98MQ-H5MX>; *Missouri State University Faculty Tenure and Promotion Policy*, SOUTHEAST MISSOURI STATE UNIVERSITY, http://www.semo.edu/facultysenate/handbook/2f.html, <http://perma.cc/GY7V-NDAG>.

[144] *Recommendations Regarding Faculty Compensation, Faculty Promotion, Tenure, Renewal of Appointment, or Nonrenewal of Appointment*, UNIVERSITY POLICY OFFICE (October 21, 2014), https://www.policies.utexas.edu/policies/recommendations-regarding-faculty-compensation-faculty-promotion-tenure-renewal-appointment, <http://perma.cc/JV4E-JXFB>.

[145] *Id.*

confirmation by the Chancellor of the University and the Board of Regents.[146] Finally, the department chair shares the results of the annual evaluation with each faculty member.[147]After consulting with the Executive Vice President and Provost and receiving the President's approval, the dean of a college or school may distribute to the faculty procedural guidelines and information for evaluation about salary advancement, promotion, or the award of tenure in the college or school.[148]

There are many decision makers who take part in the decision regarding a single employee's eligibility for any one of these advancements.[149] However, the distinguishing factor for purposes of class certification in the context of *Wal-Mart*, is that professors, unlike the plaintiffs in *Wal-Mart*,[150] have very similar job descriptions; all participate to some degree in teaching, research, and service. This weighs in favor of professors obtaining class certification under the *Wal-Mart* analysis. Scalia wrote in his majority opinion in *Wal-Mart* that the plaintiffs' "common contention . . . must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[151] This requirement is much more easily met when all the plaintiffs have the same the job description and that the "truth or falsity" of the claim will likely affect them all in a fairly uniform fashion.

B. System-Wide Disparate Treatment

One limited yet viable option for African-American professors is to bring a disparate treatment claim of pattern or practice. As noted herein, in order to prevail on a disparate treatment claim, plaintiffs must prove defendants acted with a discriminatory motive.[152] Peculiar to employment discrimination cases, the intent requirement can be proven by pattern or practice.[153] A plaintiff can prove this by showing that there has been unlawful discrimination by an employer in the course of its regular policy—that the discrimination was part of the company's regular, rather than an unusual, practice.[154]

---

[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See* Wal-Mart v. Dukes, 131 S.Ct. 2541, 2556–57 (2011) (describing the plaintiffs).
[151] *Id.* at 2551.
[152] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
[153] *Id.* at 335.
[154] See *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973) for a description of the burdens each party bears at the outset of a Title VII trial.

1. Coser v. Moore

Although this class action option consisting of a pattern-or-practice claim for African-American professors is certainly limited by the decision in *Wal-Mart*, it would not be a claim that is entirely impossible for them to bring. For African-American professors to bring a class action suit against a university system, there would need to be enough African-American professors that are able to establish by "[s]ignificant proof that [their university] operated under a general policy of discrimination."[155] If they could do so, then they could satisfy the commonality requirement under the *Wal-Mart* decision.

There have been a few instances where the court had certified a class of women for a system-wide disparate treatment suit. In *Coser v. Moore*, the court certified a class of female faculty members as a class of employees for a system-wide disparate treatment suit.[156] In that case, current and former female employees of the state university, as individuals and as representatives of a class of teaching and non-teaching professionals, brought a Title VII sex discrimination suit against the university's President, the Chancellor of the university's system, and members of the university's board of trustees.[157]

Although the court certified them as a class, the analysis would have been much more intensive had it occurred post-*Wal-Mart*. In *Coser*, the court certified the women as a class before addressing the fact that Stony Brook, the employer in question, "ha[d] no official policies that explicitly operate[d] to the disadvantage of women."[158] Had this case occurred after *Wal-Mart*, this fact would have been considered before, not after the class was certified. Evidence such as the employer not having any official policies in place that "explicitly operated[d] to the disadvantage of women" would have been probative evidence that would likely have weighed against their certification as a class.

2. Chang v. Rhode Island

Another case in which the court found that female professors met the requirements for commonality pursuant to Rule 23 was *Chang v. Rhode Island*.[159] Chang's suit alleged that the University of Rhode Island (URI) discriminated against her on the basis of gender, both in

---

[155] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982).

[156] Coser v. Moore, 587 F. Supp. 572, 574 (E.D.N.Y. 1983). The court did certify the class, but ultimately it did not find a university-wide pattern or practice of unlawful sex discrimination. The court remanded the case to consider what further steps may be taken to resolve individual claims. *Id.*

[157] *Id.* at 574.

[158] *Id.* at 579.

[159] Chang v. Rhode Island, 606 F. Supp. 1161, 1171 (D.R.I. 1985).

terminating her contract and in paying her "under scale" during her employment.[160] Chang also alleged that URI's failure to rehire her while recruiting equally- or less-qualified males violated Title VII.[161] She claimed that her experience was not unique, but rather was just one example of a pattern or practice of disparate treatment that URI "routinely utilized to the detriment of women faculty with regard to recruitment and hiring, rank at hire, pay at hire, promotion, annual compensation, tenure, and termination . . . ."[162]

Subsequently, in *Seleen*, another set of female professors filed suit against URI. This suit was "strikingly similar" to the *Chang* action in its allegations of pattern-or-practice discrimination.[163] However, the plaintiffs only challenged URI's practices with respect to annual compensation, promotion, and tenure.[164] The *Chang* and *Seleen* plaintiffs filed motions for class certification under Rule 23 and consolidation of their two actions.[165] On September 2, 1980, Judge Pettine granted consolidation of the two cases and certified the following class:

> All women faculty members who are now employed at URI; who might become employed at URI; who were employed at URI on or after March 24, 1972; and all women applicants for faculty employment on or after March 24, 1972.[166]

URI challenged the class certification via numerous motions, but consistently failed to persuade the court.[167] The court held in its post *Falcon* review that "given that linkage, Chang's claim was found to be sufficiently typical of the plaintiffs in the class and she was held to be a person who would adequately represent class interests in the litigation."[168]

Although the *Chang* court found enough linkage to bind the class for purposes of class certification, it also would have been a much different, more fact-intensive analysis under the *Wal-Mart* decision. The Court would likely have focused instead on whether the typicality of all of the plaintiffs' claims "depend upon a common contention . . . of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[169]

---

[160] *Id.*

[161] *Id.* at 1170.

[162] *Id.* at 1170–71.

[163] *Id.*

[164] *Id.*

[165] Chang v. Rhode Island, 606 F. Supp. 1161, 1170–71 (D.R.I. 1985).

[166] *Id.* March 24, 1972 is significant because it was the date that the Equal Employment Opportunity Act of 1972 amended the Civil Rights Act allowing, among other things, individual plaintiffs to bring claims.

[167] *Id.*

[168] *Id.*

[169] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011).

It is not clear whether the Court would have certified the class in *Chang* due to the wide variety of positions that the members of the class held. If the court were to have found that all of their claims could have been answered by the ultimate decision of the Court, it could have certified and moved on with the claim; in this case, however, that seems unlikely.

3. *Analysis in the Context of African-American Professors*

Notwithstanding the above, there are still several situations in which a group of African-American professors could bring a strong, viable class action with a fair likelihood of being certified as a class under the *Wal-Mart* analysis. Before reaching viable options, it seems prudent to first address the remaining obstacles of *Wal-Mart*. The commonality requirement could be satisfied by a common, discriminatory policy that is consistent across all departments and schools of a particular university. However, this is highly unlikely. First, all universities are required to have an equal employment opportunity policy, pursuant to the Equal Employment Opportunity Act of 1972 amendments to Title VII.[170] The purpose of these policies is to "ensure that all qualified individuals under consideration for jobs, promotions, pay raises, training programs, and so on, receive equal consideration, regardless of race, color, national origin, gender, religion, disability, and age."[171]

Second, it would be quite rare (not to mention incoherent), for a university to have a university-wide policy stating a facially-discriminatory policy. Most universities are likely to be deliberate in choosing their words under their employment policies, such that they will not subject themselves to employment discrimination suits such as the one contemplated here. If this were being brought prior to *Wal*-Mart, this requirement could have been circumvented by arguing that the policy-as-stated was not the same as the policy-as-implemented, or that the policy was worded in a manner that could be vulnerable to implicit bias. Alas—the court in *Wal-Mart* eliminated both of these arguments.

The *Wal-Mart* decision did not set a standard for how much evidence is necessary to show that a policy is discriminatory.[172]

---

[170] 42 U.S.C.A. § 2000e-5 (2009). *See also Applying for Employment*, THE UNIVERSITY OF TEXAS AT AUSTIN, http://www.utexas.edu/hr/prospective/apply/, <http://perma.cc/Y5H2-79MM> (stating that "The University of Texas at Austin is an Equal Opportunity Employer with a commitment to diversity at all levels. All qualified applicants will receive consideration for employment without regard to race, color, religion, gender, national origin, age, disability or veteran status. (Compliant with the new VEVRAA and Section 503 Rules).").

[171] *Id.*

[172] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2553 (2011) (noting that the only evidence of general discrimination was a sociologist's analysis asserting that Wal-Mart's corporate culture

Furthermore, it makes no difference whether the policy was actually implemented by the university faculty.[173] The *Wal-Mart* Court diverged from the *Falcon* Court by interpreting "policy" as the employer's formalized policy, whether actualized or not.[174] Therefore, the *Wal-Mart* decision has carved out a narrow possibility whereby African-American professors might bring a system-wide class action against their university.

One viable alternative for plaintiffs wanting to bring a disparate treatment claim against a university with a facially non-discriminatory policy would be to allege that they were subject to the subjective decisions of a common decision maker. This situation could lead to a viable disparate treatment pattern-or-practice claim if the employer operated under a general policy that allowed such subjective decision making, and it was aware that such subjective decision making was part of its policy.[175] For many plaintiffs employed by universities, it is likely this method provides their highest chance for success at certifying a class action.

The only limitation that *Wal-Mart* imposes on *Falcon's* footnote fifteen is that all of the plaintiffs' allegations of discriminatory actions must be against one specific decision maker. In a university setting, this is much easier than in the case of *Wal-Mart*. In *Wal-Mart*, the plaintiffs were spread out nation-wide with varying job descriptions, alleging that many different decision makers and supervisors participated in subjective decision-making practices.[176] This conclusion is consistent with Scalia's opinion in that the "determination of [the claim's] truth or falsity will resolve an issue. . . in one stroke."[177]

In a claim by African-American professors at a university, this requirement is much more likely to be met. For instance, in the context of tenure, the President is the ultimate decision maker.[178] Although the board of regents and the Chancellor must approve the decision, the President is the one who ultimately approves or disapproves.[179] The board of regents, in practice, typically would defer to the President's

---

made it vulnerable to gender bias. The Court stated that the statistician's testimony was worlds away from "significant proof" that Wal-Mart "operated under a general policy of discrimination" because the statistician could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking.).

[173] *Id.* at 2553.

[174] *Id.* at 2563–64.

[175] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988) ("[I]n appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decision making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.").

[176] Wal-Mart, 131 S.Ct. at 2554.

[177] *Id.* at 2552.

[178] *Recommendations Regarding Faculty Compensation, Faculty Promotion, Tenure, Renewal of Appointment, or Nonrenewal of Appointment*, THE UNIVERSITY OF TEXAS AT AUSTIN (Oct. 21, 2014).

[179] *Id.*

decision on the matter,[180] and effectively, the president approves any specific guidelines for determining the promotions of the employees.[181] This fact suggests there is hope for class actions brought by university professors in light of the *Wal-Mart* decision.

Some courts have held that it does not matter if the ultimate decision maker was, in fact, acting with non-discriminatory motives.[182] This is true under the "Cat's Paw Theory,"[183] laid out by the Supreme Court in *Staub v. Proctor Hospital*.[184] In transferring the characters of the fable to the workplace, the monkey represents a supervisor, motivated by a discriminatory bias, who uses the employer or the employer's decision maker to take adverse action against an employee.[185] The cat represents an unbiased decision maker who unknowingly disciplines an employee because of the supervisor's bias.[186] If a supervisor's discriminatory animus results in or contributes to an adverse employment action, the Cat's Paw Theory imputes liability on the employer.[187]

Therefore, in the context of African-American professors, if the President of a university was not, in fact, acting under discriminatory motives, but was being manipulated by inferiors, the ultimate responsibility would still lie with the President under the Cat's Paw Theory. Therefore, if the defendant were to argue that the discriminatory bias was not by the President, but by various supervisors or other employees in a department, this theory could be used to hold the President liable by satisfying the commonality requirement.

---

[180] *Id.*

[181] *See supra* note 133 and accompanying text.

[182] *See* Staub v. Proctor Hosp., 131 S.Ct. 1186, 1192–93 (2011) (explaining that an entity may be liable if an apparently neutral decision maker's ruling was influenced, even unknowingly, by the discriminatory animus of another agent of the entity); *see also* Chattman v. Toho Tenax Am., Inc., 686 F.3d 339 (6th Cir. 2012) (holding that an employer is liable for discharging an employee based upon false statements made by another employee.).

[183] "The term 'cat's paw' originated in the fable, 'The Monkey and the Cat,' by Jean de La Fontaine. As told in the fable, the monkey wanted some chestnuts that were roasting in a fire. Unwilling to burn himself in the fire, the monkey convinced the cat to retrieve the chestnuts for him. As the cat carefully scooped the chestnuts from the fire with his paw, the monkey gobbled them up. By the time the serving wench caught the two thieves, no chestnuts remained for the unhappy cat." Julie M. Covel, Note, *The Supreme Court Writes a Fractured Fable of the Cat's Paw Theory in* Staub v. Proctor Hospital, 51 WASHBURN L.J. 159, 159 (2011).

[184] *Staub*, 131 S.Ct. at 1190 n.1.

[185] Edward G. Phillips, Staub v. Proctor Hospital: *The Cat's Paw Theory Gets Its Claws Sharpened*, 47 Tenn. Bar J. 21, 21 (2011).

[186] *Id.* The cat symbolizes the person or committee in a company who possesses the authority to make the final decision to an adverse employment action. *See* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484 (10th Cir. 2006). The person with the authority to make the final decision is often referred to as the decision maker. *Id.* at 482, 484 (noting the difference between the "formal decision maker" and a subordinate who lacks the authority to make final decisions).

[187] Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

C. Disparate Impact

Finally, a strong, viable option for meeting the commonality requirement in the context of African-American professors would be to bring a disparate impact class action. In a disparate impact case, a plaintiff must demonstrate that facially-neutral employment practices or policies fall more harshly on one group than another, and the practices and policies cannot be justified by business necessity.[188]

A plaintiff seeking to bring a disparate impact claim need not prove intentional discrimination, but instead must show that the employer's action or policy, while enacted without a specific discriminatory animus, nonetheless had discriminatory results.[189] As the Supreme Court has noted, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[190] Disparate impact can be caused by "the problem of subconscious stereotypes and prejudices."[191]

In the landmark case of *Teamsters v. United States*, the Court found a viable disparate impact claim.[192] In that case, the plaintiff established company-wide discrimination through substantial statistical evidence.[193] The plaintiff produced about forty specific accounts of racial discrimination from particular individuals.[194] That number was significant because the organization had only 6,472 employees, of whom 571 were minorities,[195] and the class itself consisted of around 334 people.[196] The forty anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members.[197]

The Ninth Circuit distinguished *Wal-Mart* by showing that plaintiffs and the class filed about 120 affidavits reporting experiences of

---

[188] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Dothard v. Rawlinson, 433 U.S. 321, 322 (1977).

[189] *See* Meditz v. City of Newark, 658 F.3d 364, 370 (3d Cir. 2011) (describing the disparate impact analysis).

[190] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

[191] Aware of "the problem of subconscious stereotypes and prejudices," the court held that the employer's "undisciplined system of subjective decision making" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.* at 990–91. *See also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (recognizing "the use of 'subjective decision making'" as an "employment practic[e]" subject to disparate-impact attack).

[192] *Teamsters*, 431 U.S. at 343.

[193] *Id.* at 337–38.

[194] *Id.* at 338.

[195] *Id.* at 337.

[196] United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 308 (5th Cir. 1975), *vacated*, 431 U.S. 324 (1977).

[197] *Id.* at 315.

discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores.[198] Even if every single one of these accounts were true, it would still not be sufficient to demonstrate that the entire company "operate[s] under a general policy of discrimination,"[199] and thus would fail to meet the commonality requirement under Rule 23.

This would be a starkly different scenario for African-American professors. For our purposes, the disparate impact claim could give African-American professors yet another mode to acquire class certification by meeting the commonality requirement of Rule 23. First and foremost, in practice, it would be most diligent to always bring both a disparate treatment and a disparate impact claim. If the parties cannot be certified as a class under one theory, then they potentially could be certified under the other.[200]

Further, African-American professors would not have to prove intent. This is a much lower burden than bringing a disparate-treatment action. It is also more likely to occur in a university where administrators are very cognizant of the wording of policies and procedures in regard to the law specifically to avoid such employment discrimination lawsuits. In a disparate impact claim, a class of underrepresented African-American professors could bring a suit when a policy appears neutral on its face but is discriminatory nonetheless. If the court then finds that the group of plaintiffs has a common contention "capable of class-wide resolution,"[201] then the court should find that the class has met the commonality requirement of Rule 23. If the plaintiffs meet the other requirements, then they should be certified as a class and permitted to bring the action against the employer.

V. CONCLUSION

It is clear that *Wal-Mart* has created more obstacles for meeting the class-action requirements under Rule 23. African-American professors are already so severely underrepresented in American universities that *Wal-Mart* inhibits justice when the courts must put such impediments on actions that redress discrimination. Even though it does seem that the *Wal-Mart* decision foreclosed viable options for underrepresented faculty and staff by narrowing Rule 23's commonality requirement, there are

---

[198] Dukes v. Wal-Mart Stores, Inc. 603 F.3d. 2571, 634 (Ikuta, J., dissenting), *reversed*, 131 S.Ct. 2541 (2011).

[199] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159, n.15 (1982).

[200] Class actions may be maintained as either or both disparate treatment and disparate impact cases, but where a request for certification is based only on a pattern-or-practice theory, a type of intentional discrimination, the disparate impact theory has been waived. *See* Puffer v. Allstate Ins. Co., 675 F.3d 709, 711–12 (7th Cir. 2012).

[201] Wal-Mart Stores, Inc. v. Dukes 131 S.Ct. 2541, 2551 (2011).

still options for these African-American professors in universities. By breaking down the structure and decision-making process of such universities and identifying the ultimate decision makers, plaintiffs could obtain class certification even in light of *Wal-Mart*.

Just as in the past, the class-action requirements remain controversial and the topic of many discussions. But, with the Court's record of evolving interpretations of Rule 23's requirements throughout the decades, it is highly unlikely that the Court is done altering and amending its Rule 23 standards. At this time, attorneys face more challenges than before when bringing such actions. However, they must encourage the Court's stringent interpretation of Rule 23 to evolve into a more viable standard for plaintiffs that need class action when all other roads to justice seem impractical.